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No. 6763

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CCR  
1738

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MERCHANTS TRUST CO., Trustee of Trust No.  
123-B N. S.,

Appellant,

vs.

GALEN H. WELCH, Collector of Internal Revenue, for  
the Sixth Collection District of California,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the Southern  
District of California, Central Division.


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FILED

FEB 29 1932

PAUL P. O'BRIEN,  
CLERK





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No.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MERCHANTS TRUST CO., Trustee of Trust No.  
123-B N. S.,

Appellant,

vs.

GALEN H. WELCH, Collector of Internal Revenue, for  
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### Names and Addresses of Attorneys.

For Plaintiff and Appellant:

MILLER, CHEVALIER, PEELER & WILSON,  
ESQS.

Title Insurance Building;

GIBSON, DUNN & CRUTCHER,  
Banks-Huntley Building,  
Los Angeles, California.

For Defendant and Appellee:

SAMUEL W. McNABB, ESQ.,  
United States Attorney,

ALVA C. BAIRD, ESQ.,  
Assistant United States Attorney,  
Federal Building, Los Angeles, California.

United States of America, ss:

To GALEN H. WELCH, Collector of Internal Revenue  
for the Sixth Collection District of California, and  
SAMUEL W. McNABB, United States Attorney,  
—GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 7th day of March, A. D. 1932, pursuant to Order Allowing Appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause entitled "Merchants Trust Company, Trustee of Trust No. 123-B N. S., v. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California," No. 3811-H, wherein Merchants Trust Company, Trustee of Trust No. 123-B N. S., is the Plaintiff and Appellant, and you as Defendant and Respondent are to show cause, if any there be, why the Judgment and Decree heretofore entered on February 5th, 1932 in the said Order Allowing Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave United States District Judge for the Southern District of California, this 8th day of February, A. D. 1932, and of the

Independence of the United States, the one hundred and fifty-sixth.

Geo. Cosgrave

U. S. District Judge for the Southern District of  
California.

## RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA, )  
 ) ss:  
Southern District of Cal )

I hereby certify and return that I served the annexed Citation on the therein-named Galen H. Welch, Collector of Internal Revenue for the 6th District of Calif. by handing to and leaving a true and correct copy thereof with E. M. Cohee, Chief Deputy to same personally at Los Angeles in said District on the 9th day of Feb. A. D., 1932.

A. C. Sittel

U. S. Marshal

By Charles E. Rice

Deputy

[Endorsed]: Marshal's Civil Docket No 12738 In the United States Circuit Court of Appeals for the Ninth Circuit Merchants Trust Company, Trustee of Trust No. 123-B N. S., plaintiff and appellant vs. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, defendant and respondent. Citation Filed Feb. 12, 1932 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk.



IN THE UNITED STATES DISTRICT COURT IN  
AND FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA, CENTRAL DIVISION.

MERCHANTS TRUST COMPANY, :  
Trustee of Trust No. 123-B N. S., :  
Plaintiff, :  
:                      At Law  
-v- :                      No. 3811-H  
:  
GALEN H. WELCH, Collector of In- :  
ternal Revenue for the Sixth Collec- :  
tion District of California, :  
Defendant. :

COMPLAINT

COMES NOW the Plaintiff, and as a cause of action  
against the Defendant, Galen H. Welch, alleges:

I.

That the jurisdiction of this court is dependent upon a  
Federal question, in that the cause arises under the laws  
of the United States pertaining to Internal Revenue,  
to-wit: the Revenue Acts of 1926 and 1928.

II.

The Trustee herein is a corporation organized under  
the laws of the State of California, and authorized to act  
as trustee for express trusts, and is now the Trustee of  
Trust No. 123-B. N. S. as hereinafter referred to, and  
for the beneficiaries thereof.

III.

That the Defendant, Galen H. Welch, has been since  
April 3, 1926, and is now the duly commissioned and  
acting Collector of Internal Revenue for the Sixth Collec-  
tion District of California, pursuant to the laws of the

United States, and resides and has his office in the City of Los Angeles, County of Los Angeles, State of California.

#### IV.

That this action is brought against the Defendant as an officer acting under and by virtue of the Revenue Acts of 1926 and 1928 on account of acts done under color of his office and of the Revenue Laws of the United States as will hereinafter more fully appear.

#### V.

On, to-wit, the 9th day of May, 1922, the Merchants Trust Company entered into an agreement—a copy of which is attached hereto as Exhibit “A”, and made a part hereof—with the Hellman Commercial Trust & Savings Bank, a corporation, to purchase certain real property situated in Los Angeles County, California. The agreement to purchase was entered into by the Merchants Trust Company acting for and at the instance and request of certain persons hereinafter referred to as buyers. The Merchants Trust Company as trustee executed a declaration of trust, dated the first day of July, 1922, in which the Hellman Commercial Trust & Savings Bank was designated as trustor, and in which certain individuals named in the declaration of trust, a copy of which is attached hereto as Plaintiff’s Exhibit “B” and made a part hereof, were named as beneficiaries.

#### VI.

Said declaration of trust above referred to was entered into for the purpose of securing the unpaid balance of the purchase price of the real property mentioned in said contract dated May 9, 1922, attached hereto as Exhibit “A”, together with other amounts which had been or

might be advanced in connection therewith, and also for the further purpose of facilitating the transfer of title of portions thereof. In addition, said declaration of trust secured to any purchaser of a portion of the trust property a clear title upon completion of payments.

#### VII.

Between July 1, 1922 and January 1, 1928, the Trustee had entered into contracts for the sale of certain portions totaling a substantial part of the real property conveyed to the Trustee herein. The contracts referred to above required the purchase price to be paid in installments over varying periods of time ranging from one to four years. Under the terms of said contracts no title was conveyed to the purchaser until payments had been completed. A typical contract of sale is attached hereto, as Plaintiff's Exhibit "C", and is made a part hereof.

#### VIII.

During the calendar year 1928, the activities of the Trustee were substantially devoted to the collection of sums due under contracts entered into prior to January 1, 1928, for the sale of certain portions of the trust property.

#### IX.

The sale of real estate on contracts such as those employed by the Trustee herein, and the collection of amounts provided by said contracts covering a considerable period of time, was, during the year 1928, and prior and subsequent thereto, hazardous. In certain instances, owing to the failure of the purchaser to complete payments, the Trustee was required to repossess the property so sold.



## X.

As a result of the hazards referred to above, during 1928 and prior and subsequent thereto, it was impossible to determine whether or not the trust and/or the beneficiaries thereof realized any profit from the sale of said trust property or portions thereof until the cost, including all selling expenses of the entire trust property, had been recovered, and in no event was any taxable profit realized by the trust and/or the beneficiaries thereof from the sale of any lot or portion of said trust property, until the cost of the entire trust property had been recovered in cash.

## XI.

From the inception of the trust to December 31, 1928, and prior and subsequent thereto, the books and records of the trust had been and are now being kept on the basis of actual cash receipts and disbursements. During the years 1923, 1924, 1925, 1926, and 1927, the said Trustee, on behalf of said trust, filed returns with the Collector of Internal Revenue for the Sixth Collection District of California, on Form #1041, as a trust under the provisions of Section 219 of the Revenue Acts of 1921, 1924, and 1926.

## XII.

On or about March 13, 1929, the Commissioner of Internal Revenue ruled that the Plaintiff herein was transacting business in the form and manner ordinarily adopted by corporations, and that it constituted, during the year 1928, an association, and was taxable for said period as a corporation, and directed said Trustee to file on behalf of said trust a return for the calendar year 1928, on Form #1120, the income tax return employed by corporations, and to pay tax on any income shown thereon at the rate of

12 per centum. In addition, the Commissioner of Internal Revenue directed the Trustee to compute the income of said trust on the theory that a measure of profit was realized by the trust on the sale of each individual lot or parcel of the trust property, and that a measure of profit was received from each collection made by said trust during the calendar year 1928, without regard to whether or not the cost of the entire property of the trust had been recovered in cash.

### XIII.

The Trustee of the Plaintiff herein, under protest and to avoid the imposition of any penalties, complied with the demands of the Commissioner of Internal Revenue as set forth in the preceding paragraph of this Complaint, and on, to-wit, the 13th day of March, 1929, filed with the Defendant herein, as Collector of Internal Revenue for the Sixth Collection District of California, a tentative income tax return for the calendar year 1928, on corporate form #1120, and applied for and received an extension to May 15, 1929, in which to file a final return; and on April 18, 1929, filed a completed return for the calendar year 1928 on corporation form #1120, and paid thereon, under specific protest and duress, on, to-wit, April 18, 1929, to the Defendant, as income taxes, the amount of \$5,712.65. In determining the income of said trust for the calendar year 1928, the Trustee of the Plaintiff likewise under protest complied with the demands of the Commissioner of Internal Revenue and computed the profit of the trust for the year 1928 on the basis directed by the Commissioner of Internal Revenue as set forth in detail above.

## XIV.

Thereafter, on to-wit, April 18, 1929, in accordance with the law and the regulations, the Trustee filed with the Commissioner of Internal Revenue, through the Defendant, its claim for the refund of said taxes so erroneously assessed and paid by the Plaintiff for the calendar year 1928. The basis of said claim for refund was the same as set forth in this Complaint, and as shown in the attached copy, marked Plaintiff's Exhibit "D".

## XV.

That more than six months have elapsed since the filing of said claim for refund, and no action relative thereto has been taken by the Defendant, by the Commissioner of Internal Revenue, or by any authorized agent of either.

## XVI.

The Plaintiff did not transact business in 1928, or prior or subsequent thereto, or employ the form or manner of organization ordinarily adopted by corporations, and was not an association taxable as a corporation during the calendar year 1928, or any part thereof, and was not subject to tax as a corporation during all or any part of said calendar year 1928, and the Commissioner of Internal Revenue erred in requiring the Plaintiff to file a return as a corporation for said year and to pay any tax for said year.

## XVII.

The Commissioner of Internal Revenue erred in requiring the Plaintiff, even assuming without conceding said Plaintiff to be taxable as a corporation for the calendar year 1928, to compute or report its profit on the basis that a profit or loss was realized upon the sale of each individual lot or parcel of the trust property, and the Commis-



sioner of Internal Revenue erred in not permitting said trust to compute and report its profit, if any, if, as, and when the entire cost of said property, including all selling expenses, had been recovered from actual collections.

### XVIII.

That Defendant erroneously and unlawfully collected and is now erroneously and unlawfully withholding said taxes in the amount of \$5,712.65 from the Plaintiff, and is indebted to the Plaintiff in said sum, plus interest at the rate of six per centum per annum from April 18, 1929, the date of the payment by Plaintiff; and though often demanded the Defendant has not nor has anyone for him repaid, refunded, or credited said sum or any part thereof to the Plaintiff, and the claim of Plaintiff herein is the sole property of Plaintiff and has not been sold, transferred, or assigned to any person or individual.

WHEREFORE, Plaintiff prays for judgment against the Defendant in the amount of \$5,712.65, plus interest at six per centum from April 18, 1929, together with costs of suit.

MILLER, CHEVALIER, PEELER & WILSON,

By Dana Latham

By Joseph D. Peeler

By Melvin D. Wilson

GIBSON, DUNN & CRUTCHER,

By Henry F. Prince

Attorneys for Plaintiff.

STATE OF CALIFORNIA            )  
  ) ss.  
COUNTY OF LOS ANGELES )

L. S. Colyer, being first duly sworn, on oath deposes and says:

That he is Secretary of Merchants Trust Company, Trustee of Trust #123-B N. S., and as such he has authority to verify the foregoing Complaint; that he has read the said Complaint and that the facts therein contained are true to the best of his knowledge and belief.

L. S. Colyer

Subscribed and sworn to before me this 21st day of November, A. D. 1929.

Emil Baruch

Notary Public in and for the County of Los Angeles,  
State of California.

[Seal]

[Endorsed]: At Law No. 3811-H In the United States District Court in and for the Southern District of California, Central Division. Merchants Trust Company, Trustee of Trust No. 123-B, N. S. plaintiff, v. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, defendant. Complaint. Filed Nov. 22, 1929 R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk. Miller, Chevalier, Peeler & Wilson, 819 Title Insurance Bldg., Los Angeles, California, attorneys for plaintiff.

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

MERCHANTS TRUST COM- )	
PANY, Trustee of Trust No. )	
123-B N. S., )	
Plaintiff, )	AT LAW
)	No. 3811-H
vs. )	
)	ANSWER OF
GALEN H. WELCH, Collector )	DEFENDANT
of Internal Revenue for the Sixth )	WELCH.
District of California, )	
)	
Defendant. )	

COMES NOW the defendant, Galen H. Welch, and in answer to the above complaint, admits, denies and alleges, to-wit:

I.

Answering Paragraph I of plaintiff's complaint, defendant admits the allegations contained therein.

II.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph II, and upon that ground denies each and every allegation contained therein.

III.

Answering Paragraph III of plaintiff's complaint, defendant admits the allegations contained therein.

IV.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph IV,



and upon that ground denies each and every allegation contained therein.

V.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph V, and upon that ground denies each and every allegation contained therein.

VI.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph VI, and upon that ground denies each and every allegation contained therein.

VII.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph VII, and upon that ground denies each and every allegation contained therein.

VIII.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph VIII, and upon that ground denies each and every allegation contained therein.

IX.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph IX, and upon that ground denies each and every allegation contained therein.

X.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph X, and upon that ground denies each and every allegation contained therein.

## XI.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph XI, and upon that ground denies each and every allegation contained therein.

## XII.

Answering the allegations contained in Paragraph XII, this defendant admits that on or about March 13th, 1929, the Commissioner of Internal Revenue ruled that the plaintiff herein was transacting business in the form and manner ordinarily adopted by corporations and that it constituted, during the year 1928, an association and was taxable for said period as a corporation. Defendant further admits that on or about the said 13th day of March, 1929, the Commissioner of Internal Revenue directed that the said Trustee file, on behalf of said trust, a return for the calendar year 1928 on Form 1120, and to pay tax on any income shown thereon at the rate of 12 per centum. Defendants denies each and every other allegation contained in said paragraph.

## XIII.

Answering the allegations contained in Paragraph XIII, this defendant admits that on or about April 18th, 1929 plaintiff filed a completed return for the calendar year 1928 on corporation form 1120, and paid thereon, on said date, to the said defendant, as income tax, the amount of Five Thousand Seven Hundred and Twelve and 65/100 Dollars (\$5,712.65). Defendant denies each and every other allegation contained in said paragraph.

## XIV.

This defendant has no information upon which to base a belief as to the allegations contained in Paragraph XIV,

and upon that ground denies each and every allegation contained therein.

XV.

Answering Paragraph XV of plaintiff's complaint, defendant admits the allegations contained therein.

XVI.

Answering Paragraph XVI of plaintiff's complaint, defendant denies each and every allegation contained therein.

XVII.

Defendant denies generally and specifically each and every allegation contained in Paragraph XVII. Defendant admits that it has not repaid to plaintiff the sum of Five Thousand Seven Hundred Twelve and 65/100 Dollars (\$5,712.65), but denies each and every other allegation in said paragraph.

WHEREFORE, defendant respectfully prays that plaintiff take nothing by its complaint; that judgment be rendered for the defendant and that the defendant have its costs of suit.

SAMUEL W. McNABB

United States Attorney.

Harry Graham Balter

HARRY GRAHAM BALTER

Assistant United States Attorney.

UNITED STATES OF AMERICA, )

Southern District of California ) : ss.

HARRY GRAHAM BALTER, being first duly sworn, deposes and says: that he is an Assistant to the United States Attorney for the Southern District of California,



and one of the attorneys for the defendant in the within entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are herein stated on his information or belief, and as to those matters that he believes it to be true.

Harry Graham Balter

HARRY GRAHAM BALTER

SUBSCRIBED and SWORN to before me this 26th day of December, 1929.

R. S. Zimmerman,

Clerk, U. S. District Court, Southern  
District of California

By Edmund L. Smith, Deputy

[Seal]

[Endorsed]: At Law No. 3811-H In the District Court of the United States for the Southern District of California Central Division Merchants Trust Company, Trustee of Trust No. 123-B N. S., Plaintiff, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth District of California, Defendant. Answer of Defendant Welch. Received copy of within answer this 28 day of December, 1929 Miller, Chevalier, Peeler & Wilson By Melvin D. Wilson Attorney for Plaintiff Filed Dec. 28, 1929 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

MERCHANTS TRUST COMPANY, )	
Trustee of Trust No. 123-B N. S., )	
)	
Plaintiff, )	
)	
vs. )	
)	At Law
GALEN H. WELCH, Collector of )	No. 3811-H.
Internal Revenue for the Sixth Dis- )	
trict of California, )	
)	
Defendant. )	

STIPULATION WAIVING JURY

We, the Attorneys for the respective parties, hereby waive the trial to the jury of this cause and agree to submit the same to the Court without the intervention of a jury.

DATED: December 21, 1929.

MILLER, CHEVALIER, PEELER & WILSON

By Melvin D. Wilson

Attorneys for Plaintiff

DATED: December 23, 1929.

SAMUEL W. McNABB

United States Attorney

By Harry Graham Balter

Assistant United States Attorney

Attorneys for Defendant.

[Endorsed]: At Law No. 3811-H In the District Court of the United States in and for the Southern District of California Central Division Merchants Trust Company, Trustee of Trust No. 123-B N. S., Plaintiff, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth District of California, Defendant. Stipulation Waiving Jury Filed Dec 23 1929 R. S. Zimmerman R. S. Zimmerman, Clerk. Miller, Chevalier, Peeler & Wilson 819 Title Insurance Building Los Angeles, California. Attorneys for Plaintiff.

---

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

MERCHANTS TRUST COMPANY, (	
Trustee of Trust No. 123-B N. S., )	
(	
Plaintiff, )	
(	At Law -
vs. )	No. 3811-H.
(	
GALEN H. WELCH, Collector of )	
Internal Revenue for the Sixth Col- (	
lection District of California, )	
(	
Defendant. )	

SPECIAL FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on regularly for trial on the 16th day of June, 1931, before the Court sitting without a jury, trial by jury having been waived by written stipulation of

the parties hereto; plaintiff appearing by Miller, Chevalier, Peeler & Wilson, through Melvin D. Wilson, Esq., and Gibson, Dunn & Crutcher, through Henry F. Prince, Esq., its attorneys, and the defendant appearing by Samuel W. McNabb, United States Attorney for the Southern District of California, Ignatius F. Parker, Assistant United States Attorney for said District, and Alva C. Baird, Special Attorney, Bureau of Internal Revenue; the case having been submitted on a written Stipulation of Facts, briefs having been filed and the Court having fully considered the same, the Court hereby adopts the facts stipulated in writing as its Special Findings of Fact and particularly those enumerated below, and adopts the Conclusions of Law hereinafter indicated:

I.

H. H. Cotton, who had been engaged in the real estate business in and around the City of Los Angeles, California, for a great many years, entered into a contract with the Rodeo Land and Water Company to purchase a tract of land comprising approximately 190 acres, for the sum of \$242,314. The purchase contract was transferred to the Hellman Commercial Trust & Savings Bank as Trustee, and the trust was designated 123.

II.

One C. C. C. Tatum desired to purchase a portion of the land involved in Trust 123 for the purpose of subdivision and sale, and interested nineteen other persons, including H. H. Cotton, and caused the Merchants Trust Company to enter into a contract to purchase approximately 136½ acres of the land from the Hellman Commercial Trust & Savings Bank for the sum of \$320,785. H. H. Cotton, as the principal beneficiary of Trust 123,



approved the contract for the seller, and C. C. C. Tatum approved the contract for the buyer. The Merchants Trust Company held the purchase contract as Trustee for the 20 persons interested in the enterprise. The Trust was designated as Trust No. 123-B. N. S. The last named Trust, a copy of which was attached to and made a part of plaintiff's complaint, was executed on the 1st day of July, 1922. The tract of 136½ acres acquired by the Merchants Trust Company, as Trustee, acting for the syndicate of 20 persons, referred to above, was located within what is now the present corporate limits of the City of Beverly Hills, California. The motivating purpose of this Trust was to subdivide into city lots, improve and sell the tract, above referred to, to the profit of the beneficiaries interested therein.

### III.

Both H. H. Cotton and C. C. C. Tatum were substantially interested in the Trust as beneficiaries. The latter individual became exclusive sales agent for the Trust, and was authorized to and did promote the enterprise of improving, subdividing and selling the property.

### IV.

The amount to be paid for the one hundred thirty-six and one-half acres involved, was \$320,785.00, payable in five (5) yearly installments, the first of which became due in May, 1923. All of the installments were for the sum of \$50,000, each, except the last and final payment, which became due on May 9, 1927, which was for the sum of \$70,785. All of the deferred payments bore interest from May 9, 1922 at the rate of six per cent (6%) payable semi-annually.

## V.

There were associated with Mr. Tatum and Mr. Cotton in this enterprise, eighteen (18) other beneficiaries, each owning beneficial interests of from five to ten one hundred fiftieths (5 to 10/150ths).

The Court also finds:

## VI.

That from the inception of the Trust to December 31, 1928, and prior and subsequent thereto, the books and records of the trust had been and are now being kept on the basis of actual cash receipts and disbursements. During the years 1923, 1924, 1925, 1926 and 1927, the said Trustee, on behalf of said Trust, filed returns with the Collector of Internal Revenue for the Sixth Collection District of California, on Form #1041, as a Trust under the provisions of Section 219 of the Revenue Acts of 1921, 1924, and 1926.

That within one year after the passage of the Revenue Act of 1928, the Trustee filed an election to be taxed under the provisions of Section 704(b) of the Revenue Act of 1928, for all years prior to 1928, and that pursuant to said election the Commissioner of Internal Revenue taxed said Trust as a Trust for those years.

## VII.

That the Commissioner of Internal Revenue ruled that the Plaintiff herein was transacting business in the form and manner ordinarily adopted by corporations, and that it constituted, during the year 1928, an association, and was taxable for said period as a corporation, and directed the Trustee to file on behalf of said Trust, a return for the calendar year 1928, on Form #1120, the income tax return employed by corporations, and to pay tax on any income shown thereon at the rate of 12 per centum.

## VIII.

That the Trustee of the Plaintiff herein, under protest and to avoid the imposition of any penalties, complied with the demands of the Commissioner of Internal Revenue as set forth in the preceding paragraph, and on the 13th day of March, 1929, filed with the Defendant herein as Collector of Internal Revenue for the Sixth Collection District of California, a tentative income tax return for the calendar year 1928, on Form #1120, and applied for and received an extension to May 15, 1929, in which to file a final return; and on April 18, 1929, filed a completed return for the calendar year 1928 on corporation Form #1120, and paid thereon, under specific protest and duress, on, to-wit, April 18, 1929, to the Defendant, as income taxes for the year 1928, the amount of \$5,712.65, together with interest from March 15, 1929, on one quarter of said amount.

## IX.

That thereafter, on, to-wit, April 18, 1929, in accordance with the law and the regulations, the Trustee filed with the Commissioner of Internal Revenue, through the Defendant, its claim for the refund of said taxes paid by the Plaintiff to the Defendant for the year 1928.

## X.

That neither the Commissioner of Internal Revenue, nor the Defendant, nor any other authorized agent, acted upon said claim within six months after the filing thereof.

## XI.

That the claim is the property of Plaintiff and has not been sold, transferred or assigned to any person or individual.

## XII.

That the map indicating the lots and specifying the streets, was recorded June 26, 1922. Such map was prepared in March, 1922, but the surveying of the land and the preparation of the map was paid for by this trust after its execution.

## XIII.

That the minimum restrictions to be imposed upon the buyers of lots sold by this Trust, were fixed by the seller of the land to this Trust namely, Hellman Commercial Trust and Savings Bank and Minna A. Newman, who was acting for H. H. Cotton.

## XIV.

The Beneficiaries of Trust 123-B N. S. never had a formal meeting at which they voted on any question pertaining to the business of the Trust, or gave instructions to Mr. Tatum or the Trustee. Mr. Tatum has remained the Attorney-in-Fact, and the sales agent since the inception of the trust and has superintended the development of the property and the sale of the lots during that period.

## XV.

The Trust never acquired more than the original lots specified and set forth in the Declaration of Trust.

## XVI.

The Trust had no specific name other than Trust 123-B N. S., given to it by the Trustee on its records. It had no by-laws, seal, stationery, officers, other than the Attorney-in-Fact and the sales agent, and it did not have any place of business except that the Trustee had its own place of business.

## XVII

In 1928, no improvements were made, no maps recorded, and no streets dedicated.



## XVIII.

The Trustee required any and all instructions from Mr. C. C. C. Tatum to be given in writing. Mr. Tatum conferred with, and received the approval of the Trustee before making expenditures for improvement, and conferred with, and received the approval of Mr. H. H. Cotton, relative to increasing the minimum building restrictions imposed on lot purchasers.

## XIX.

That the total acreage in the lots involved in Trust No. 123-B N. S. was one hundred thirty-six and one-half ( $136\frac{1}{2}$ ) acres within the County of Los Angeles, California, all of said land now being included within the corporate limits of the City of Beverly Hills; that said lots were acquired by Trust No. 123-B N. S. for the purpose of improvement and sale of the lots in the subdivision.

## XX.

Units of beneficial interests were sold to the other beneficiaries for the purpose of raising additional capital to facilitate the development, improvement and sale of the tract; all of said beneficiaries purchased said units of beneficial interests for the purpose of making a profit. The beneficiaries received certificates of beneficial interests in the form set forth in Exhibit H. The beneficiaries were entitled to and did receive, upon request, information from the Trustee or the sales agent relative to the development and sale of the lots comprising the tract of land held by the trust.

## XXI.

That some of said beneficial interests were sold, transferred and assigned by the holders thereof, or pledged as

collateral security for the payment of money or the performance of other obligations.

## XXII.

That the necessary improvement and development made on said tract by said Trust, consisted mainly of grading, rolling and oiling streets, constructing curbs and sidewalks, and installing a water system (including the drilling of wells) for use in the development of the tract and for the domestic use of the lot purchasers.

## XXIII.

That a sales office was maintained on said tract by the sales agent, the property advertised for sale, and a force of sales agents engaged who operated under the direction of C. C. C. Tatum; that during the year 1928 the sales force was reduced to that of a tract manager, but that a continuous effort has been made from the inception of the trust, to date, to dispose of the remaining lots in the tract.

## XXIV.

The evidence submitted discloses that this syndicate, known as Trust No. 123-B N. S., was, during the taxable year 1928, engaged in business. At the inception of the Trust, there were six hundred eighty-five lots sold. Three of these were sold in 1928, and the Trust had on hand for the purposes of sale, forty-six and one-half ( $46\frac{1}{2}$ ) lots at the close of the last-named year. The management, control and sale of the lots was vested in the beneficiaries, and the Merchants Trust Company, as Trustee, was authorized to act upon the order of the beneficiaries holding a majority of beneficial interests. The beneficiaries appointed C. C. C. Tatum "as their and each of their attorney-in-fact to represent them in all matters affecting said buyers in connection with this Trust", \* \* \*. How-

ever, the Trustee was authorized to act upon the exclusive order of Tatum, subject, however, to the right of the majority of holders of certificates of beneficial interests to remove Tatum as attorney-in-fact. In addition to the initial investment by the holders of certificate of beneficial interests, two assessments were made for the purpose of defraying outstanding obligations, amounting to the sums of \$17,499.27 and \$75,000.99, respectively. For the purpose of making these assessments, assessment notices were sent to the certificate holders. A copy of the form of notice used for this purpose was introduced in evidence as Exhibit "I". A distribution of the proceeds to the holders of certificates of beneficial interests, up to and including December 31, 1928, totaled \$745,900.00.

### CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court determines:

1. That the Plaintiff, Trust No. 123-B N. S., was, during the calendar year 1928, an association within the meaning of the Revenue Act of 1928 and was therefore subject to tax as a corporation under Sections 13 and 701 of the Revenue Act of 1928.

2. That the tax in issue was lawfully collected from the Plaintiff by the Defendant.

3. That upon the pleadings the evidence and the law Plaintiff is not entitled to recover anything from the Defendant and that judgment must be for the Defendant with costs and his disbursements herein.

Dated: This 5th day of February, 1932.

Geo. Cosgrave

UNITED STATES DISTRICT JUDGE.

Approved as to form as provided by Rule 44:

Melvin D. Wilson

Attorneys for Plaintiff.

[Endorsed]: At law. No. 3811-H. In the District Court of the United States, in and for the Southern District of California, Central Division. Merchants Trust Company Trustee of Trust No. 123-B, N. S. plaintiffs, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, defendant. Special Findings of fact and Conclusions of law. Received copy of the within Special Findings of Fact and Conclusions of Law this 27th day of January, 1932. Miller, Chevalier, Peeler & Wilson, by Melvin D. Wilson, attorneys for plaintiff. Filed Feb. 5-1932 R. S. Zimmerman, Clerk By Francis E. Cross Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA CENTRAL DIVISION

MERCHANTS TRUST COMPANY,	)	
Trustee of Trust No. 123-B N. S.,	)	
	)	
	)	Plaintiff,
	)	At Law
	)	No. 3811-H.
-vs-	)	
	)	DECISION.
GALEN H. WELCH, Collector of	)	
Internal Revenue for the Sixth Col-	)	
lection District of California,	)	
	)	
	)	Defendant.)

---

Judgment is ordered for defendant on authority of Security First National Bank of Los Angeles vs. Galen H. Welch, No. 6582, decided by the U. S. Circuit Court of Appeals, Ninth Circuit, December 7, 1931.



Defendant will prepare and present findings.

Dated this 21st day of December, 1931.

Geo. Cosgrave,  
U. S. District Judge.

Filed Dec. 21 1931

R. S. Zimmerman Clerk  
By Francis E. Cross  
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

MERCHANTS TRUST COM-	(	
PANY, Trustee of Trust No.	)	
123-B N. S.,	(	
	)	
Plaintiff,	)	
	(	At Law-No. 3811-H.
vs.	)	
	(	
GALEN H. WELCH, Collector	)	
of Internal Revenue for the	(	JUDGMENT.
Sixth Collection District of	)	
California,	)	
Defendant.	)	
	(	

The above entitled cause came on regularly for trial on the 16th day of June, 1931, before the Court sitting without a jury, trial by jury having been waived by written stipulation of the parties hereto; plaintiff appearing by Miller, Chevalier, Peeler & Wilson, through Melvin D. Wilson, Esq., and Gibson, Dunn & Crutcher, through Henry F. Prince, Esq., its attorneys, and the defendant appearing by Samuel W. McNabb, United States Attorney for the Southern District of California, Ignatius F.

Parker, Assistant United States Attorney for said District, and Alva C. Baird, Special Attorney, Bureau of Internal Revenue; the case having been submitted on a written Stipulation of Facts, briefs having been filed, and the cause having been submitted for decision, and the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised in the premises:

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by its complaint and that judgment be entered against the plaintiff and in favor of the defendant, together with his costs and disbursements incurred in said action as provided by law and taxed by the Clerk of this Court in the sum of \$15.50.

Dated: This 5th day of February, 1932.

Geo. Cosgrave

UNITED STATES DISTRICT JUDGE.

Approved as to Form as provided by Rule 44:

Melvin D. Wilson

Attorney for Plaintiff.

JUDGMENT ENTERED FEBRUARY 5 1932.

R. S. ZIMMERMAN, Clerk

By Francis E. Cross

Deputy Clerk

[Endorsed]: At Law—No. 3811-H. In the District Court of the United States, in and for the Southern District of California, Central Division. Merchants Trust Company, Trustee of Trust No. 123-B N. S. plaintiff, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth District of California, defendant. Judgment Received copy of the within Judgment this 28th day of January, 1932. Miller, Chevalier, Peeler & Wilson, by Melvin D. Wilson attorneys for plaintiff. Filed Feb. 5-1932 R. S. Zimmerman, Clerk By Francis E Cross Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA    CENTRAL DIVISION

MERCHANTS TRUST COM- )	
PANY, Trustee of Trust No. )	
123-B N. S., )	
)	
Plaintiff, )	
)	
vs. )	At Law    No. 3811-H.
)	
GALEN H. WELCH, Collector )	
of Internal Revenue for the )	
Sixth Collection District of )	
California, )	
)	
Defendant. )	

ENGROSSED BILL OF EXCEPTIONS

BE IT REMEMBERED, that on the 16th day of June, 1931, the above entitled cause came on for trial before this Court, Honorable George Cosgrave presiding, the Court sitting without a jury, trial by jury having been waived in writing by counsel for the respective parties.

The case was submitted on a written stipulation of facts, and a further stipulation introducing into evidence numerous documents. Briefs were filed and the cause submitted for decision.

Plaintiff appeared by Messrs. Miller, Chevalier, Peeler & Wilson, by Melvin D. Wilson, Esq., and Messrs. Gibson, Dunn & Crutcher, by Henry F. Prince, Esq., and the Defendant appeared by Samuel W. McNabb, United States Attorney for the Southern District of California, Ignatius F. Parker, Assistant United States Attorney for

said District, and Alva C. Baird, Special Attorney, Bureau of Internal Revenue.

The parties introduced into evidence a stipulation as to certain facts which had been agreed upon by both parties, which Stipulation is attached hereto and hereby made a part of this Engrossed Bill of Exceptions.

The parties further introduced into evidence a Stipulation Relating to Exhibits, together with exhibits lettered "A" to "N". The said Stipulation and Exhibits "A" to "M", inclusive, are attached hereto and hereby made a part of this Engrossed Bill of Exceptions.

After the Court made a minute order finding for the Defendant and instructing the Defendant to prepare and file his special findings of fact and denying the Plaintiff's request for special findings of fact, the Plaintiff filed written exceptions, which Exceptions on Behalf of Plaintiff are attached hereto and hereby made a part of this Bill of Exceptions. The Court allowed the exceptions as shown therein.

The Special Findings of Fact and Conclusions of Law proposed by Plaintiff and denied by the Court, of which denial the Plaintiff took an exception, are attached hereto and made a part hereof.

### STIPULATION RE APPROVAL OF BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between Attorneys for Plaintiff and Defendant that the foregoing Bill of Exceptions has been presented in time, that it contains all evidence given, and proceedings had in the trial of this action material to the appeal of Plaintiff, and that it may be approved, allowed and settled by the Judge in the above entitled Court as correct in all respects, and that the same shall be made a part of the record in said case and be the bill of exceptions therein, and that said



Bill of Exceptions may be used by either Plaintiff or Defendant upon any appeal taken by either Plaintiff or Defendant.

DATED: February 10th, 1932.

MILLER, CHEVALIER, PEELER & WILSON

By Melvin D Wilson

Attorneys for Plaintiff.

SAMUEL W. McNABB,

United States Attorney,

Ignatius F Parker

By Alva C Baird

Assistant United States Attorneys,

Attorneys for Defendant.

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA CENTRAL DIVISION

MERCHANTS TRUST COM- )

PANY, Trustee of Trust No. )

123-B N. S. )

Plaintiff, )

vs. )

GALEN H. WELCH, Collector )

of Internal Revenue for the )

Sixth Collection District of )

California, )

Defendant. )

At Law No. 3811-H

STIPULATION

IT IS HEREBY STIPULATED, by and between the respective parties hereto, through their respective counsel, MESSRS. MILLER, CHEVALIER, PEELER & WILSON, for the Plaintiff, and SAMUEL W. McNABB,

Esq., United States District Attorney, CLYDE THOMAS, Assistant United States District Attorney, and ALVA C. BAIR, Special Attorney for the Bureau of Internal Revenue, for the Defendant, that the following statements are true and correct and may be used as agreed evidence in this case without prejudice to the right of either party to introduce additional evidence not contradictory to the statements contained in this Stipulation:

I.

From the inception of the Trust to December 31, 1928, and prior and subsequent thereto, the books and records of the trust had been and are now being kept on the basis of actual cash receipts and disbursements. During the years 1923, 1924, 1925, 1926 and 1927, the said Trustee, on behalf of said Trust, filed returns with the Collector of Internal Revenue for the Sixth Collection District of California, on Form #1041, as a Trust under the provisions of Section 219 of the Revenue Acts of 1921, 1924, and 1926.

That within one year after the passage of the Revenue Act of 1928, the Trustee filed an election to be taxed under the provisions of Section 704(b) of the Revenue Act of 1928, for all years prior to 1928, and that pursuant to said election the Commissioner of Internal Revenue taxed said Trust as a Trust for those years.

II.

That the Commissioner of Internal Revenue ruled that the Plaintiff herein was transacting business in the form and manner ordinarily adopted by corporations, and that it constituted, during the year 1928, an association, and was taxable for said period as a corporation, and directed the Trustee to file on behalf of said trust, a return for

the calendar year 1928, on Form #1120, the income tax return employed by corporations, and to pay tax on any income shown thereon at the rate of 12 per centum.

### III.

That the Trustee of the Plaintiff herein, under protest and to avoid the imposition of any penalties, complied with the demands of the Commissioner of Internal Revenue as set forth in the preceding paragraph, and on the 13th day of March, 1929, filed with the Defendant herein, as Collector of Internal Revenue for the Sixth Collection District of California, a tentative income tax return for the calendar year 1928, on Form #1120, and applied for and received an extension to May 15, 1929, in which to file a final return; and on April 18, 1929, filed a completed return for the calendar year 1928 on corporation Form #1120, and paid thereon, under specific protest and duress, on, to-wit, April 18, 1929, to the Defendant, as income taxes for the year 1928, the amount of \$5,712.65, together with interest from March 15, 1929, on one-quarter of said amount.

### IV.

That thereafter, on, to-wit, April 18, 1929, in accordance with the law and the regulations, the Trustee filed with the Commissioner of Internal Revenue, through the Defendant, its claim for the refund of said taxes paid by the Plaintiff to the Defendant for the year 1928.

### V.

That neither the Commissioner of Internal Revenue, nor the Defendant, nor any other authorized agent, acted upon said claim within six months after the filing thereof.

## VI.

That the claim is the property of Plaintiff and has not been sold, transferred or assigned to any person or individual.

## VII.

That the map indicating the lots and specifying the streets, was recorded June 26, 1922. Such map was prepared in March 1922, but the surveying of the land and the preparation of the map was paid for by this trust after its execution.

## VIII.

That the minimum restrictions to be imposed upon the buyers of lots sold by this Trust, were fixed by the seller of the land to this Trust namely, Hellman Commercial Trust and Savings Bank and Minna A. Newman, who was acting for H. H. Cotton.

## IX.

The Beneficiaries of Trust 123-B N. S. never had a formal meeting at which they voted on any question pertaining to the business of the Trust, or gave instructions to Mr. Tatum or the Trustee. Mr. Tatum has remained the Attorney-in-Fact, and the sales agent since the inception of the trust and has superintended the development of the property and the sale of the lots during that period.

## X.

The Trust never acquired more than the original lots specified and set forth in the Declaration of Trust.

## XI.

The Trust had no specific name other than Trust 123 B. N. S., given to it by the Trustee on its records. It had no by-laws, seal, stationery, officers, other than the At-



torney-in-Fact and the sales agent, and it did not have any place of business except that the Trustee had its own place of business.

## XII.

In 1928, no improvements were made, no maps recorded, and no streets dedicated.

## XIII.

The Trustee required any and all instructions from Mr. C. C. C. Tatum to be given in writing. Mr. Tatum conferred with, and received the approval of the Trustee before making expenditures for improvement, and conferred with, and received the approval of Mr. H. H. Cotton relative to increasing the minimum building restrictions imposed on lot purchasers.

## XIV.

That the total acreage in the lots involved in Trust No. 123-B N. S. was one hundred thirty-six and one-half ( $136\frac{1}{2}$ ) acres within the County of Los Angeles, California, all of said land now being included within the corporate limits of the City of Beverly Hills; that said lots were acquired by Trust No. 123-B N. S. for the purpose of improvement and sale of the lots in the subdivision.

## XV.

Units of beneficial interests were sold to the other beneficiaries for the purpose of raising additional capital to facilitate the development, improvement and sale of the tract; all of said beneficiaries purchased said units of beneficial interests for the purpose of making a profit. **The** beneficiaries received certificates of beneficial interests in the form set forth in Exhibit H. The beneficiaries were entitled to and did receive, upon request, information

from the Trustee or the sales agent relative to the development and sale of the lots comprising the tract of land held by the trust.

#### XVI.

That some of said beneficial interests were sold, transferred and assigned by the holders thereof, or pledged as collateral security for the payment of money or the performance of other obligations.

#### XVII.

That the necessary improvement and development made on said tract by said Trust, consisted mainly of grading, rolling and oiling streets, constructing curbs and sidewalks, and installing a water system (including the drilling of wells) for use in the development of the tract and for the domestic use of the lot purchasers.

#### XVIII.

That a sales office was maintained on said tract by the sales agent, the property advertised for sale, and a force of sales agents engaged who operated under the direction of C. C. C. Tatum; that during the year 1928 the sales force was reduced to that of a tract manager, but that a continuous effort has been made from the inception of the trust, to date, to dispose of the remaining lots in the tract.

#### XIX.

That Mr. H. H. Cotton, a beneficiary of the trust and a real estate operator of many years experience in the vicinity of Los Angeles would, were he called as a witness in this case, subject to the objection by the Defendant as set forth below, testify as follows:

Q. You are familiar with these trust forms, Mr. Cotton?

A. Yes.

Q. How long to your knowledge have they been used in and about Los Angeles?

A. To my knowledge, the first time they were used by myself was in 1906.

Q. What were the circumstances?

A. Prior to the time that the trust form was used the custom in this country was to buy a piece of land by the subdivider on a small payment and give an obligation back in the shape of a mortgage or a trust deed which covered the entire property. Then the subdivider would subdivide the property up and issue his own contracts to the purchasers subject to the lien of the first mortgage or trust deed, and, generally without stating so in the contracts, collect the money and use it as he saw fit. And generally there were not proper release clauses in the mortgage. In other words, they were generally sold, not by lots, but by large parcels or acreages, or in larger amounts, and it was a kind of an absolute dependence upon the honesty and integrity and ability of the subdivider as to whether the purchaser would ever get a title or not, because if there was any default in any way under the underlying obligation, the whole property would revert to the original seller, and the purchaser would be foreclosed, as he only held such title as the purchaser or subdivider had. This happened in a great many cases in California. About this time a Mr. Carlson was subdividing the Redondo Villa Tract, and one of our title companies here, in order to save the situation, had to go in and pay the entire original lien, so as to give the purchasers their titles. This was the first time I had ever heard of the so-called subdivision trust.

In the general run of this type of activity, the property, generally by a small payment on the part of the purchaser or subdivider, was deeded by the owner to a responsible bank or trust company with instructions on his

part as to how the property was to be disposed of, and with instructions on the part of the purchaser or subdivider to the trustee as to his method of handling the property. And the subdivider sold the property and turned in his sales to the trustee, and, provided they were within the instructions of the original owner, the trustee executed the contracts, collected the moneys, distributed the money as provided by the instructions of the seller and the buyer, liquidated the transaction by giving a deed to the purchaser, and, finally, closed the trust at the expiration of the deal when all the property was disposed of or all that was contemplated to be disposed of. And then he either deeded the remaining property to the buyer or the seller as and in case the instructions provided.

Q. Did you find, Mr. Cotton, from your experience that the trust device such as you have described remedied the difficulties you referred to previously?

A. It remedied it in whole, because a responsible issuing company such as a bank or trust company would not issue a contract unless they had specific instructions from the original owner that, provided the contract was carried out for the second purchaser or the purchaser under the subdivider, that they could deliver a deed to him on the same condition on which the contract was issued. As soon as this method of doing business came into use it very soon became impossible to dispose of any land under subdivision agreements in this community without the contracts being issued by a trust company or by a bank of responsibility because people very soon became educated to the fact that in one way they were protected and in the other they were not. And I think at the present time it would be very nearly impossible to sell any amount of land in this community without the safeguard of a responsible trustee issuing the contracts.

Q. Do you know of your own knowledge, Mr. Cotton, whether these trust devices have been used in and about Los Angeles continuously from 1906 to the present time?



A. They have been, in ever-increasing quantities.

Q. So now it is the common, recognized method of subdividing real estate in this vicinity?

A. I don't know of my own knowledge of any tracts that are being subdivided in this community that are not being handled that way.

The Defendant objects to the introduction of the above testimony and to each of the foregoing questions upon the ground that the matter sought to be elicited from the witness is irrelevant and immaterial to the case.

XX.

That Mr. Cotton's testimony may, subject to the Court's ruling on the objection of Defendant, be considered as having been testified to upon the trial of this case.

IT IS FURTHER STIPULATED that should the Court overrule the objection to the introduction of the testimony of Mr. Cotton, that the Defendant may have an exception on such ruling.

DATED: June 15, 1931.

MILLER, CHEVALIER, PEELER & WILSON

By Melvin D. Wilson

Attorneys for Plaintiff.

SAMUEL W. McNABB

United States Attorney

By Ignatius F. Parker

Assistant United States Attorney

Alva C. Baird

Alva C. Baird

Special Attorney

Bureau of Internal Revenue

Attorneys for Defendant.

IN THE UNITED STATES DISTRICT COURT IN  
AND FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA CENTRAL DIVISION

MERCHANTS TRUST COM-	)	
PANY, Trustee of Trust No.	)	
123-B N. S.,	)	
	)	
	)	Plaintiff, ) At Law No. 3811-H.
	)	
vs.	)	STIPULATION
	)	RELATING TO
GALEN H. WELCH, Collector	)	EXHIBITS.
of Internal Revenue for the	)	
Sixth Collection District of	)	
California,	)	
	)	
	)	Defendant. )

IT IS HEREBY STIPULATED AND AGREED by  
and between the respective parties hereto, through their  
respective counsel, that:

I.

Exhibits A, B and D, attached to the complaint on file  
herein are true and correct copies of the Agreement of  
Sale, dated May 9, 1922, the Trust Declaration, and the  
Claim for Refund, and that the same may be considered  
as having been regularly introduced in evidence in the  
above case.

II.

IT IS FURTHER STIPULATED that Exhibits C-1,  
C-2 and C-3, and Exhibits E, F, G, H and I, hereinafter  
attached, are true and correct copies of the documents used  
in connection with the administration of the affairs of said  
Trust No. 123-B. N. S.

That Exhibits J (pages 1-10, inclusive), L and M, hereinafter attached, correctly reflect information appearing on the records pertaining to said Trust in the office of the Trustee thereof.

That Exhibit K consists of true copies of letters and correspondence from the files of said Trust, all of which was received or transmitted in due course.

That Exhibit N is a true copy of Trust Declaration No. 123.

IT IS FURTHER STIPULATED AND AGREED that the foregoing Exhibits together with the Stipulation of Facts, dated June 15, 1931 and filed in the office of the Clerk of this Court on June 16, 1931, constitutes all the evidence to be offered in said case, and that the cause may stand submitted, briefs to be filed by the respective parties within such time as the Court may direct.

DATED: 15 day of June, 1931.

Miller Chevalier Peeler & Wilson

By Melvin D. Wilson

Attorneys for Plaintiff.

SAMUEL W. McNABB,

United States Attorney,

IGNATIUS F. PARKER,

Assistant U. S. Attorney,

Alva C Baird

ALVA C. BAIRD,

Special Attorney,

Bureau of Internal Revenue,

Attorneys for Defendant.

Ex. A

## AGREEMENT OF SALE

THIS AGREEMENT MADE AND ENTERED INTO this 9th day of May, 1922, by and between the Hellman Commercial Trust and Savings Bank, a corporation, organized and existing under the laws of the State of California, and having its principal place of business in Los Angeles, California, hereinafter called the "Seller", and the Merchants Trust Company, a corporation, likewise organized and existing under the laws of the State of California, and also with its principal place of business in Los Angeles, California, hereinafter called the "Buyer", WITNESSETH:

That the Seller in consideration of the covenants and agreements on the part of the Buyer hereinafter contained, hereby agrees to sell and convey to the Buyer, subject to the terms and conditions hereinafter set out, all that real property situated in the County of Los Angeles, State of California, more particularly described as:

Lots One (1) to Three Hundred Seventy-five (375) and Lots Five Hundred Eighty-seven (587) to Eight Hundred Ninety-six (896) inclusive in Tract 4988, as per map of said Tract recorded in Book 54, page 98 and 99 of Maps, Records of Los Angeles County, California, but reserving all building on said property,

(It is understood, however, that at the date of this agreement said map has not been filed for record and the book and page of recordation may be inserted after the execution hereof, and said lots are a portion of the property conveyed to the said Seller by the Rodeo Land and Water Company by deed dated May 10th, 1922, re-



corded in Book 1018, page 392 Official Records, which also at this time does not appear of record, but which said dates may be inserted herein after that event).

It is further understood and agreed that this Agreement of Sale is made subject to the proportion of taxes for the fiscal year 1922-23, applicable to the aforesaid lots, but which has been assessed to the whole of said property, described in the aforesaid deed, also all future taxes and assessments levied, assessed or to become due against the property hereby agreed to be conveyed as aforesaid, and it is further understood and agreed that while the following exceptions did not appear in the aforesaid deed, this agreement to convey is subject to the following provisions as far as same apply to that portion of the property described in said deed covered by this agreement and which has been agreed to by the Seller with the said Rodeo Land and Water Company, to-wit:

(a) That the Rodeo Land and Water Company reserves the right to maintain a sewer in any roads, highways, etc., (as a condition made by the Rodeo Land and Water Company in consenting to the subdivision of said property) and that the said sewer may have proper and adequate fall for drainage purposes.

(b) That the Rodeo Land and Water Company reserves to itself the water wells situated and now existing in the southwesterly corner of Parcel 2 described in said deed, together with the right of ingress to and egress from and use of all water from said wells with sufficient land around the same to properly operate the wells until the City of Beverly Hills shall have been taken in, annexed to and made a part of the City of Los Angeles, but not exceeding a term of five years from the date

hereof, and upon said City of Beverly Hills being annexed to the City of Los Angeles, or in case such annexation does not take place within five years from the date hereof, then at the end of five years from the date hereof, the water wells above referred to, also the pumping plant, pipe lines and other appliances lying within the land in said deed described and used in connection therewith, shall be and become the property of the Buyer hereunder, or its assigns, providing the Buyer or its assigns are not at that time in default in the payment of any sums of principal or interest payable under the terms hereof or in default in any other covenant or condition upon its part to be performed.

(c) That the Rodeo Land and Water Company reserves to itself, its successors or assigns, the right to construct and maintain at all times and keep in proper repair and to enter upon said land for said purpose, sewer pipe lines of proper size for the purpose of sewer drainage in connection with septic tank or tanks to be operated or maintained on the parcel of land lying immediately south of Parcel 2 described in said deed, and belonging to the said Rodeo Land and Water Company, provided, however, that said sewer pipe lines shall be placed and maintained in any street or alley dedicated for public use, but the right of maintenance and construction shall not be over any of the lots in any subdivision hereafter offered for record, it being understood, however, that the Rodeo Land and Water Company will convey to the Seller herein, or its assigns, an acre of land out of said tract of land lying south of said Parcel 2 described in said deed, to be used by said Seller herein or its assigns for septic tank purposes, together with the

right to ingress to or egress from said acre of land to said Parcel 2, as described in said deed.

The full purchase price of said property agreed to be sold hereby is the sum of Three Hundred Twenty Thousand Seven Hundred Eighty-five (\$320,785.00) Dollars, payable as follows:

Fifty Thousand (\$50,000.00) upon the execution of this agreement, receipt of which is hereby acknowledged, and the balance of said sum, namely Two Hundred Seventy Thousand Seven Hundred Eighty-five (\$270,785.00) Dollars, payable as follows:

\$50,000.00	on	or	before	one	year	from	date	hereof;
\$50,000.00	"	"	"	two	"	"	"	"
\$50,000.00	"	"	"	three	"	"	"	"
\$50,000.00	"	"	"	four	"	"	"	"
\$70,785.00	"	"	"	five	"	"	"	"

with interest at the rate of six per cent per annum on such deferred payments from date hereof, payable semi-annually.

It is further understood and agreed between the parties hereto that in this transaction the said Seller is acting as Trustee for the Rodeo Land and Water Company and Minna A. Newman, she having purchased said property from the Rodeo Land and Water Company, who conveyed said property in trust to the Seller hereunder upon certain provisions of trust set out and declared in its Declaration of Trust No. 123 N. S., to which reference may be had, and there shall be no obligation upon the Seller to act hereunder except in accordance with the terms and provisions of said Declaration of Trust, it being however, further understood that the Merchants Trust Company, the Buyer, has furnished no portion of the purchase



price recited as paid on this contract but that the same was furnished by C. C. C. Tatum and other parties whose names are not ascertainable at this time, but for whose benefit said Tatum has and does hereby assign all interest in his original contract to purchase said property, to the Buyer hereunder and has authorized the making of this contract to said Buyer instead of himself personally, and a Declaration of Trust is to be issued by the said Merchants Trust Company showing that it holds said equitable interest in said property for said parties in the proportions hereafter to be ascertained and that there shall be no obligation upon said Buyer for the payments provided to be made hereunder, except it shall receive the same from its aforesaid beneficiaries or from resale of said property in accordance with the terms of the proposed Declaration of Trust to be issued by it.

It is a further provision hereof that in case the Buyer, acting for its said Beneficiaries, makes sale of any of said lots, that it shall be authorized to call upon the Seller to make deed of conveyance thereof to such person or persons as it may nominate and likewise to make contracts of sale upon lots sold upon deferred payments as it is authorized to do itself under said proposed Declaration of Trust, providing the terms of sale price, and conditions thereof are not in conflict with the aforesaid Declaration of Trust issued by the Seller as Trustee for the Rodeo Land and Water Company and Minna A. Newman, it being further provided that the Seller agrees to release lots and make conveyance thereof to purchasers from the Buyer hereunder upon the fixed release price per lot according to the terms of a schedule of release prices, which shall be \$100.00 per lot more than that fixed



in the Declaration of Trust issued as aforesaid by the Seller to the Rodeo Land and Water Company to which reference may be had.

It is a further provision hereof that before the said Buyer or its Beneficiaries under the proposed Declaration of Trust above referred to, shall commence any improvements in the way of street work or otherwise upon said property, that they shall furnish to the Seller a satisfactory guarantee that no liens shall attach to said property by reason of such improvements and this provision hereof shall be a condition precedent to the performance hereunder by the Seller,

It is understood and agreed that time is of the essence of this agreement and that this agreement is entered into on the part of the Seller only in consideration of the payment of \$50,000.00 hereinbefore referred to, and in case the purchaser fails to make any of the payments of principal or interest promptly, in accordance with the terms and provisions of this agreement, or fails to comply with any of the covenants and conditions upon its part to be performed, then the said Seller shall be released from all obligations in law or equity to convey said property, and the Seller shall have the right immediately and without further notice to terminate all rights of the Buyer under this agreement and to retain for its own use and benefit as rent for the use of said premises and as consideration for entering into this contract, all of the payments made hereunder, and the Buyer further agrees for itself and its beneficiaries under its aforesaid Declaration of Trust, that if for any reason the rights under this agreement are terminated, it will immediately deliver possession of said property (other than such as

may have been released and deeded hereunder) to the Seller and will execute any and all quitclaim deeds, or any other instrument requisite or suitable for the clearing of the title from any cloud thereon, whether caused by this agreement or any act of the Buyer or its assigns while claiming thereunder, or while in possession of said property.

Nothing herein, however, shall in any event be construed to entitle the said Buyer, or its successors or assigns, or beneficiaries under its aforesaid proposed Declaration of Trust, to recover back any sums whatsoever paid under this contract, in accordance with the terms and conditions thereof, and any and all improvements placed upon said property by the Buyer or its assigns or beneficiaries under its aforesaid Declaration of Trust shall become the absolute property of the Seller without any compensation thereof to it or them.

IN WITNESS WHEREOF, the Hellman Commercial Trust and Savings Bank, a corporation, as Seller and the Merchants Trust Company, a corporation as Buyer, has caused their respective corporate names to be affixed hereto under their respective seals by their respective officers thereunto duly authorized the day and year first above written.

HELLMAN COMMERCIAL TRUST  
AND SAVINGS BANK

By C. R. Bell

Vice-President.

By H. B. KELLEY

Secretary

MERCHANTS TRUST COMPANY.

By EMANUEL COHEN

President

By W. E. GILL

Secretary

The above contract is hereby approved:

H. H. COTTON

Representing the Seller for its Beneficiaries.

C. C. C. TATUM

Representing himself and the beneficiaries under proposed Declaration of Trust to be issued by the Buyer.

This is certified to be a *trust* and correct copy of the original document held in the trust files of the Bank of America of California.

BANK OF AMERICA OF CALIFORNIA

By A. J. ROBILLARD

Assistant Trust Officer

Ex. "B"

## DECLARATION OF TRUST

No. 123-B N. S.

KNOW ALL MEN BY THESE PRESENTS, THAT WHEREAS, on the ninth day of May, 1922, the Merchants Trust Company, a corporation organized and existing under the laws of the State of California and having its principal place of business in Los Angeles, California, (hereinafter referred to as "Trustee"), entered into an agreement with the Hellman Commercial Trust and Savings Bank, a corporation, likewise organized and existing (hereinafter referred to as "Seller") to purchase that certain real property located in the County of Los Angeles, California, described as:

Lots One (1) to Three Hundred Seventy-five (375) inclusive, and Lots Five Hundred Eighty-seven (587) to Eight Hundred Ninety-six (896) inclusive, in Tract 4988,



as per map of said Tract recorded in Book 54, Pages 98 and 99 of Maps, Records of Los Angeles County, California.

(it being understood, however, that at the date of said contract said map was not of record), and that the said Seller reserved all the buildings located on said property and that said sale was made subject to the proportion of taxes for the fiscal year 1922-23 applicable to the aforesaid lots, which had been assessed as a whole with other property described in the deed from the Rodeo Land and Water Company, dated May 10th, 1922, recorded in Book 1018, Page 392 Official Records to the Seller named herein, and that the Rodeo Land and Water Company reserved the right to maintain a sewer in roads or highways shown in said subdivision and also reserved all water wells situated in said property together with the right of ingress to and egress from and the use of all the water from said wells with sufficient land around the same to properly operate the wells until such time as the City of Beverly Hills shall be taken in, annexed to or made a part of the City of Los Angeles, but not exceeding a term of five (5) years from the date of said deed, with a further provision that in case such annexation does not take place within five (5) years from said date, that the wells above referred to, also pumping plant, pipe lines and other appliances lying within the property described herein shall become the property of its Buyer, or their assigns, providing that at that time no default in any of the matters referred to in this Declaration of Trust to be performed by the said Buyer has occurred, also that the said Rodeo Land and Water Company reserved the right to construct and maintain at all times and keep in proper



repair and to enter upon said land for such purposes, sewer pipe lines of proper size for the use of sewer drainage in connection with septic tanks to be operated and maintained on the land lying south of the property herein described and belonging to the Rodeo Land and Water Company, providing however, that said sewer pipe shall be placed and maintained in the streets or alleys in said subdivision, all of which facts are more fully set out in said Agreement to purchase, to which reference may be had, and said sale was made subject thereto, and

WHEREAS, said Agreement to purchase was entered into by the Trustee named herein acting for and at the instance and request of the hereinafter named parties herein referred to as "Buyers", and that all moneys paid on said contract of sale was furnished by said Buyers in the proportion hereinafter set out and no part thereof was furnished by the said Trustee individually, and that said Buyers for the purposes of this Trust shall be considered the beneficiaries hereunder subject to the terms and provisions of said Agreement to purchase in the following proportions, to-wit:

C. C. C. Tatum.....	20/150ths
H. H. Cotton.....	10/150ths
Stanley S. Anderson.....	5/150ths
W. M. Lenz.....	5/150ths
J. A. LeDoux.....	10/150ths
S. M. Folsom.....	5/150ths
Florence F. Gibbons.....	5/150ths
E. J. Gates.....	10/150ths
Arthur H. Rude.....	5/150ths
Byron H. Patterson.....	5/150ths

Tom S. Ingersoll.....	5/150ths
A. J. Felker.....	10/150ths
Van R. Kelsey.....	10/150ths
W. H. Clune.....	5/150ths
Alexander Pattie .....	10/150ths
Jos. Engert .....	5/150ths
Andy H. Williams.....	10/150ths
E. T. Keiser.....	5/150ths
W. F. King.....	5/150ths
R. M. Hulst.....	5/150ths

and

WHEREAS, There is an unpaid balance of the purchase price to be paid for said property as provided in said contract to purchase, amounting to the sum of Two Hundred Seventy Thousand Seven Hundred Eighty-five (\$270,785.00) Dollars, payable as follows:

\$50,000.00	on or before one	year	from May 9th, 1922
\$50,000.00	“ “ “	two	“ “ “ 9th, 1922
\$50,000.00	“ “ “	three	“ “ “ 9th, 1922
\$50,000.00	“ “ “	four	“ “ “ 9th, 1922, and
\$70,785.00	“ “ “	five	“ “ “ 9th, 1922,

together with interest at the rate of six per cent (6%) per annum on such deferred payments from said date of May 9th, 1922, payable semi-annually, and

WHEREAS, it is provided in said contract to purchase that the Seller herein holds legal title to said property IN TRUST for the Rodeo Land and Water Company, with power of sale, however, subject to the terms and conditions of trust set out in its original Declaration of Trust No. 123 N. S., and that there shall be no obligation on

the Seller herein in carrying out the terms of said contract to purchase above referred to, except in accordance with the terms and provisions of its Declaration of Trust last referred to, and that the terms and provisions of this Declaration of Trust issued by the Trustee herein shall not be in conflict with the terms of the Declaration of Trust above referred to heretofore issued by the Seller as Trustee for the Rodeo Land and Water Company, and in case of any conflict in any minor detail, then the terms of the last named Declaration of Trust shall govern the situation.

NOW, THEREFORE, This Declaration of Trust witnesseth, certifies and declares that the said Merchants Trust Company, as Trustee aforesaid, holds and shall continue to hold the equitable interest in the aforesaid described property acquired by it by virtue of the aforesaid agreement to purchase IN TRUST, upon the terms, conditions and provisions of trust hereinafter specifically set out to-wit:

FIRST: To make re-sale of said property at prices and upon terms and conditions of sale as directed by the Buyers named as beneficiaries herein, providing at all times that no lot shall be sold at a price less than thirty-five per cent (35%) more than the following schedule of release prices, which schedule of release prices is a fixed, determined and agreed upon price per lot, at which the Seller hereunder agrees to release lots covered by said agreement to purchase, which schedule of release prices shall be as follows:

RELEASE PRICE OF LOTS TRACT 4988  
C. C. C. TATUM PURCHASE

					Each
Lots	1 to	11 both inclusive			500
"	12 "	15 "	"	"	700
"	16				1350
"	17 "	20 "	"	"	1000
"	21				1350
"	22 "	26 "	"	"	700
"	27 "	50 "	"	"	500
"	51 "	54 "	"	"	700
"	55				1350
"	56 "	59 "	"	"	1000
"	60				1350
"	61 "	65 "	"	"	700
"	66 "	93 "	"	"	500
"	94 "	97 "	"	"	700
"	98				1350
"	99 "	102 "	"	"	1000
"	103				1350
"	104 "	108 "	"	"	700
"	109 "	140 "	"	"	500
"	141 "	144 "	"	"	700
"	145				1350
"	146 "	149 "	"	"	1000
"	150				1350
"	151 "	155 "	"	"	700
"	156 "	191 "	"	"	500
"	192 "	195 "	"	"	600
"	196				1350
"	197 "	200 "	"	"	1000
"	201				1350
"	202 "	206 "	"	"	700
"	207 "	246 "	"	"	500
"	247 "	250 "	"	"	700



"	251				1350
"	252	"	255	"	1000
"	256				1250
"	257	"	261	"	700
"	262	"	305	"	500
"	306	"	309	"	700
"	310				1250
"	311	"	314	"	1000
"	315				1350
"	316	"	320	"	700
"	321	"	368	"	500
"	369	"	372	"	700
"	373				1350
"	374	"	375	"	1000
"	587	"	588	"	1000
"	589				1350
"	590	"	594	"	700
"	595	"	613	"	500
"	614	"	617	"	700
"	618				1350
"	619	"	622	"	1000
"	623	"			1350
"	624	"	628	"	700
"	629	"	647	"	500
"	648	"	651	"	700
"	652				1350
"	653	"	656	"	1000
"	657				1350
"	658	"	661	"	700
"	662	"	683	"	500
					Each
Lots	684 to 686 both inclusive				700
"	687				1350
"	688	"	691	"	1000
"	692				1350
"	693	"	696	"	700

"	697	"	722	"	"	500
"	723	"	725	"	"	700
"	726					1350
"	727	"	730	"	"	1000
"	731					1350
"	732	"	735	"	"	700
"	736	"	768	"	"	700
"	769					1350
"	770	"	773	"	"	1000
"	774					1350
"	775	"	779	"	"	700
"	780	"	811	"	"	500
"	812	"	815	"	"	700
"	816					1350
"	817	"	820	"	"	1000
"	821					1350
"	822	"	826	"	"	700
"	827	"	862	"	"	500
"	863	"	866	"	"	700
"	867					1350
"	868	"	871	"	"	1000
"	872					1250
"	873	"	877	"	"	700
"	878	"	896	"	"	500

SECOND: Said sales may be either for all cash or under contract on time payments, providing no lot shall be sold for less cash payment than twenty per cent (20%) down and the balance not extending over more than three (3) years from the date of respective contracts. In case of cash sales, the release price shall be paid forthwith and any moneys in excess thereof shall be placed to the credit of the Buyers and in case of sales of lots on contract, seventy-five (75) per cent of the first cash payment shall be placed to the credit of the Buyers and the re-

maining twenty-five (25) per cent of such cash payment to the credit of the Seller to be applied on respective release prices, and thereafter all moneys payable under said contracts of sale shall be divided one-half to the credit of the Buyers and one-half to the credit of the Seller until in this way the Seller shall receive its full release price of respective lots, but in no event shall any lot be conveyed until the full release price thereof has been paid, nor moneys paid to the Buyers from the sale of any lot in excess of an amount which will leave an ample provision for the payment of such release price.

THIRD: All contracts of sale and deeds of conveyance shall be issued in the name of the Seller and same shall be issued by it when and as requested by the Trustee hereunder, and to such purchasers of lots as shall be procured by the Trustee acting for the Buyers.

FOURTH: All moneys received from the sale of lots, either as deposits, first payments on contract or full payments made (in case of cash sales) shall be paid to the Trustee and disbursed by it as above provided, placing proper proportion thereof to the credit of the Buyers named herein and the balance to the Seller, and any conveyance made by the Seller shall vest in its grantee a good and unassailable title clear of any further obligation by the Seller to the Trustee here under or to the Buyers and free and discharged of this trust and from the trust above referred to under which the Seller, acting as Trustee for the Rodeo Land and Water Company, holds title to said property.

FIFTH: The Buyers named herein obligate themselves to pay for all costs of street work or other improvements placed upon said property and before said improve-

ments are commenced, they shall furnish to the Trustee herein a guarantee satisfactory to the Seller, that no liens of any kind or character shall be permitted to be attached to said property by reason of said proposed improvements thereon, and the Buyers shall not enter into any contract in the matter of improvements and sale by them or on their behalf, of said property, or any part thereof, or the doing of any street work thereon whereby a lien might be attached to said property or any part thereof, without having first obtained the consent of the Trustee and the Seller.

SIXTH: The Buyers shall be privileged to retain possession of said property and have the management and control thereof as long as there is no default in the provisions of this Declaration of Trust, or in the provisions of the aforesaid contract to purchase, subject, however, in all matters to the provisions of this trust and the provisions of the said contract to purchase, and for the purpose of making sale of said lots said Buyers may select and employ such agent, agents or sub-agents as they deem fit, providing the same are not objectionable to the Trustee and to the Seller, but any such agent, agents or sub-agents so employed at the request of and with the consent of said Buyers, shall be construed to be the agents of the Buyers and not the agents of the Seller or the Trustee and the Seller and Trustee or either of them shall not be liable or bound by any action of such agent or agents unless specifically authorized by them respectively, nor for any wrong-doing, misappropriation or misconduct of any such agent or sub-agent.

SEVENTH: The Buyers hereby specifically covenant and agree to pay all taxes and assessments of every kind



hereafter levied or assessed or to become due against said property, including the taxes for the fiscal year 1922-23, and their failure to do so shall be construed as a default hereunder and in case of such default, either the Seller or the Trustee may, but without any obligation upon them or either of them so to do, pay such taxes or assessments and the amount so paid shall become immediately due and payable by the Buyers, together with interest on the amount so advanced at the rate of one per cent (1%) per month until repaid, and the Buyers severally agree to repay the amount of any and all advancements made by the Trustee or by the Seller for their benefit, or for the benefit of or on account of said property either as aforesaid or for improvements made or to be made thereon, immediately and upon demand, together with interest thereon aforesaid, and any moneys in the hands of the Trustee realized from the sale of said lots or otherwise standing to the credit of the Buyers in excess of the respective release prices of respective lots may be used by the Trustee in its discretion for the payment of interest, taxes or street work or other improvements done on said property when and as the same become due without specific order of the Buyers to that effect, and the Trustee may pay agents' commissions from the moneys realized from the sale of said lots or said property, standing to the credit of the Buyers in accordance with the terms of the hereinafter sales agency provisions set out herein, and the Buyers hereby severally obligate themselves to pay to the Trustee its fees and charges as hereinafter provided for, out of any moneys in the hands of the Trustee realized from the sale of said lots standing to their credit and such fees and charges of the Trustee shall become and

constitute a lien upon the interest of the Buyers in said property and upon all funds and securities coming into its hands hereunder standing to the credit of or held for the benefit of the Buyers and upon failure on the part of the Buyers to pay or repay the Trustee said fees and charges upon demand, the Trustee may apply any funds belonging to the said Buyers to the discharge thereof and may sell according to law any such securities and apply the proceeds in liquidation and discharge of such fees and charges, and all advancements made by the Trustee or the Seller shall become and constitute a lien upon the equitable interest in said trust property held by the Trustee, and upon failure on the part of the Buyers to pay or re-pay on demand of the Trustee or Seller, as the case may be, such sums so advanced or upon their failure to pay the Seller the sum of principal and interest due it in accordance with the terms hereof and the said agreement to purchase, or upon their failure to do anything herein provided to be done by them as herein provided, then the Trustee or Seller or either of them, may at their or either of their respective option declare the unpaid principal of said purchase price, together with interest thereon accrued and unpaid, immediately due and payable and may proceed to foreclose the rights of the Buyers hereunder and in said contract to purchase in the manner hereinafter provided.

EIGHTH: All moneys received from the sale of said property for the credit of the Seller on account of the aforesaid release prices of lots shall accumulate in the hands of the Trustee until it has received the sum of One Thousand (\$1,000.00) Dollars, or multiples thereof, whereupon it shall pay said sum so accumulated to the

Seller as a payment on account of the principal sum due it on the unpaid balance of the purchase price of said property and to be credited on the principal of the first installment thereof thereafter becoming due and the interest on such amount so paid shall cease from the time of such payment by the Trustee to the Seller, and from any moneys realized from the sale of said lots or otherwise standing in the hands of the Trustee for the account of the Buyers, the Trustee shall as and when due, pay the amount of interest due the Seller on the unpaid balance of the purchase price without any specific order to that effect from the Buyers. After full payment of the purchase price and interest thereon has been made to the Sellers and any advancements made by it together with interest thereon as aforesaid, have been fully paid, then all restraint hereinabove or hereinafter imposed on the Buyers in the management and sale of said property and improvements made thereon shall cease and determine and all of said property then remaining unsold shall be forthwith conveyed by the Seller to the Trustee named herein and by it held and sold as it may be directed to do by the Buyers and all moneys realized from the residue of the property so conveyed to the Trustee shall be applied by the Trustee as directed by the Buyers, providing all fees of the Trustee and all advancements made by it shall have been paid.

NINTH: The Trustee is authorized as property is sold, to procure at the expense of the Buyers, Certificates of Title to be furnished to the purchasers of lots and in case it is necessary to make escrows in any matter, the Buyers shall pay all fees and charges in connection therewith.



TENTH: No sale or transfer of any beneficial interest whatsoever hereunder shall be valid or binding upon said Trustee unless and until an executed original of assignment or other instrument evidencing such sale or transfer shall have been filed with the Trustee, except only where such interest may pass or be transferred by decree or order of court, and then only upon satisfactory proof of the regularity and validity of such matter being presented to the Trustee and for each such sale or assignment there shall be payable to the Trustee a fee of Five (\$5.00) Dollars in addition to other fees herein provided for.

ELEVENTH: If any property covered hereby or any portion thereof or the proceeds realized from the sale thereof, shall become liable for the payment of inheritance or other taxes, the Trustee is authorized to withhold the amount of such taxes out of the moneys aforesaid in its hands which may be payable to the person or persons liable for such taxes, and charge the same against such person or persons, unless said tax shall have been paid by such person or persons, and if paid by the Trustee such payment shall be deemed as an advancement made hereunder.

TWELFTH: In the management, control and sale of said lots, the Trustee as regards the Buyers aforesaid, is hereby authorized and empowered to act upon the order of the Buyers holding a majority beneficial interest hereunder, and in and when so acting, any such action on the part of the Trustee shall bind conclusively each and all of the Buyers aforesaid, and each of said Buyers do hereby appoint C. C. C. Tatum as their and each of their attorney-in-fact to represent them in all matters



affecting the said Buyers in connection with this trust and the trustee is authorized to act upon the exclusive order of said Tatum and when so acting the Trustee shall be under no liability to the other Buyers whatsoever, but it is further provided that upon notice to the Trustee signed by a majority in interest of said Buyers, removing said Tatum from such position as their attorney in fact, no further orders in that regard shall be accepted by the Trustee.

THIRTEENTH: The Buyers hereunder severally bind themselves to pay as and when due all sums in proportion to their respective beneficial interest as aforesaid, necessary as above set out for the subdivision and improvement of said property and for taxes and for any and all other obligations provided for herein to be paid by them, and also any advancements made for their benefit or for the benefit of the property including the fees, expenses and charges of the Trustee for acting hereunder, immediately and upon demand made upon them by the Trustee, together with interest aforesaid, if any accrued thereon, unless the equivalent thereof shall be standing to their credit realized from the sale of said property, which provision as to the liability of the Buyers under this paragraph shall as a covenant between themselves only, extend to the payment of the unpaid balance of the purchase price of said property, together with interest thereon and in the event that any one of said Buyers named herein shall fail to pay his proportionate share of any such sums as and when the same shall become due and payable or **demand** therefor shall be made by the Trustee, then the Trustee itself or any one or more of said Buyers shall have the right to advance and pay such share to the end

that said property covered hereby and the trust herein provided for, and all parties interested herein may be protected; and any such sum or sums as advanced and paid for such defaulting Buyer shall bear interest from the date of such advancement until repaid at the rate of one per cent (1%) per month, and in the event of the exercising of such right above mentioned, the Trustee upon its own behalf, or upon the written demand of the party or parties making such payment and without any demand by the Trustee on such defaulting Buyer for the payment or reimbursement of such proportionate share, shall sell the interest of such defaulting Buyer under this trust, which sale shall be made in the following manner:

The Trustee shall first publish notice of the time and place of such sale with a description of the interest so to be sold at least once a week for four successive weeks in some newspaper of general circulation published in the City of Los Angeles, California, and may from time to time postpone such sale by publication of such postponement in the same newspaper in one (1) issue only, or at its option by public announcement of such postponement at the time and place of sale so advertised as aforesaid; and on the date of such sale so advertised, or on the date to which such sale may be postponed, the Trustee may sell said interest so advertised at public auction in said city of Los Angeles, to the highest bidder for cash, and any beneficiary hereunder or any other person may bid and purchase at such sale; and upon such sale the Trustee, after due payment made to it hereunder, may make and deliver to the purchaser at such sale an assignment and transfer of the interest so sold, and thereafter such purchaser shall have the same rights and privileges as the

original Buyer so defaulting as aforesaid, subject, however to all of the terms and conditions of this trust; and each of said Buyers for himself, his heirs and assigns, does hereby convey, assign and transfer to the Trustee any and all right and title whatsoever in and to his beneficial interest hereunder, to enable the Trustee to convey, assign and transfer such interest upon such sale thereof by the Trustee in the event of default as above provided.

Distribution of the proceeds arising from such sale by the Trustee shall be made and applied by the Trustee as follows:

1st. To the payment of the expenses of such sale, including the Trustee's fee of \$100.00, which amount shall be in addition to the fees to it elsewhere herein provided; all to become and be due and payable upon action by the Trustee on its own behalf in such sale, or upon demand being made upon the Trustee for the sale by it of the interest of such defaulting Buyer as hereinabove provided.

2nd. To the person or persons having paid the same, the amount advanced and paid by him or them for such defaulting Buyer as hereinabove provided and interest thereon aforesaid, and the remainder, if any, to the order of the defaulting Buyer. In the event of the sale of such interest aforesaid hereunder of any defaulting Buyer, and execution by the Trustee of assignment and transfer thereof under this trust, then the recitals therein as to default and publication of notice of sale, and demand that such sale be made, postponement of sale, amount and terms of sale, purchaser, payment of purchase money, or any other fact or facts affecting the regularity and validity of such sale, shall be conclusive proof of all facts recited in such assignment and transfer, and any such assignment and



transfer with such recitals therein shall be effectual and conclusive against such defaulting Buyer and all other persons as to all facts recited therein; and the receipt of the purchase money contained in any assignment and transfer executed by the Trustee to the purchaser at such sale as aforesaid shall be sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money.

FOURTEENTH: It is mutually understood and agreed by all parties hereto that the money heretofore paid on the purchase price of said property under the aforesaid agreement to purchase dated May 9th, 1922, between the Hellman Commercial Trust and Savings Bank, as Seller, and the Merchants Trust Company, as Buyer and named herein as Trustee, and wherein it was agreed that time should be the essence thereof, which provision shall apply to the terms of this instrument, it is further agreed that in case the Buyers hereunder fail to make any or all of the payments of principal or interest provided to be paid hereunder and under said agreement to purchase, promptly and in accordance with the terms and provisions of said agreement to purchase and hereunder or fail to comply with any of the covenants or conditions imposed upon them by the terms hereof, that then the said Seller shall be relieved from all obligation in law or equity from making contracts of sale or any further conveyance of said property and the Trustee named herein may refuse to make further sales of said property, even though demanded to do so by the Buyers, and the Seller shall have the right immediately and without further notice to demand foreclosure of this instrument in the manner hereinafter provided, and the Seller shall retain for its own use



and benefit as rent for the use of said premises and as consideration for entering into this trust all payments then before made under said original agreement of sale or made hereunder and the Buyers further agree that in the event of such foreclosure that they will deliver possession of said property, except such part as has then before been sold, to the Seller, and the Trustee hereunder shall execute and deliver to the Seller a quit claim deed or other instrument requisite and suitable for the clearing of the title of said property from any cloud thereon, either caused by this instrument or by the Trustee or Buyers while claiming or while in possession of said property. It is further understood and agreed that the forfeiture of the moneys paid under said original agreement of sale or paid hereunder by the Buyers and the forfeiture of all of their right, title and interest in and to the property herein affected shall be the sole remedy to the Seller against the Buyers personally in case they shall not make the payments herein specified on account of the purchase price of said property, but nothing herein contained shall in any event be construed to entitle said Buyers to recover back any sums provided to be paid under said agreement of sale and this instrument in accordance with the provisions and terms hereof and any and all improvements made or placed upon said property by the Buyers shall become the absolute property of the Seller without any compensation therefor to the Buyers.

FIFTEENTH: At the request of the said Buyers, C. C. C. Tatum is hereby appointed the manager and exclusive selling agent of said property for a term of three (3) years from the date hereof and as compensation therefor he shall receive a commission at the rate of

twenty (20) per cent on the net sales price of respective lots and out of moneys received from the sale of lot or lots standing to the credit of the Buyers aforesaid, he shall be paid one-half of each payment as received, until he shall have received his full twenty per cent.

SIXTEENTH: Should a breach or default be made in the payment of any of the sums secured hereby or herein provided to be paid or repaid by the Buyers hereunder, or should they fail to perform any of their other duties or obligations imposed upon them by the terms of this instrument, then in addition to the other rights of the Seller hereunder as hereinabove provided, and as an additional remedy, the Trustee or Seller hereunder may declare all sums payable hereunder or under said agreement of sale, immediately due and payable, and the Trustee is hereby authorized thereupon to sell the property aforesaid so held in trust in the manner hereinafter provided, and out of the proceeds realized from such sale, after paying the expenses thereof, including attorney's fees, to pay the amount of the unpaid remainder of said purchase price of said property, together with interest accrued thereon, as hereinbefore mentioned and secured hereby. Before making said sale the Trustee shall cause to be filed in the office of the County Recorder of Los Angeles County, California, a notice of such breach and default, and that the Seller elects to have the property described in this Declaration of Trust sold to satisfy the obligations secured hereunder, and three (3) months after the filing of said notice, without demand on the Buyers or any of them, the Trustee may proceed to sell the property aforesaid or any portion thereof, for cash for the highest

price which it is able to obtain, such sale being made in the following manner:

The Trustee shall first publish notice of the time and place of such sale with the description of said property so to be sold, at least once each week for three (3) successive weeks in some newspaper of general circulation printed in the City of Los Angeles, California and notice of such sale shall be posted complying with the laws of California governing sales of real property under execution, and may from time to time postpone said sale by announcement at the time and place of sale fixed or by re-publishing notice of said sale in the same newspaper with the date of postponement attached thereto in one issue only, prior to the date of the postponed sale, and on the date so announced or advertised, or any date to which said sale may be postponed, the Trustee may sell said property or any portion thereof either en masse or in separate parcels, in its own discretion, at public auction, at which sale the Trustee or any *part* hereto may be a purchaser; and after such sale and payment made, the Trustee may execute and deliver a deed or deeds conveying the property so sold to the purchaser or purchasers thereof, but without covenant or warranty expressed or implied, whereupon such purchaser or purchasers shall be let into immediate possession of said property so sold, and all persons in possession thereof shall be deemed to be tenants at sufferance, and the recitals by the Trustee in any such deed or deeds of any or all facts or matters affecting the regularity or validity of any such sale shall be conclusive against all persons, including the Buyers and each of them, and their successors in interest. Such sale, however, shall be made

subject to any outstanding contracts thenbefore made by the Seller for the sale of respective lots aforesaid, but all moneys then remaining unpaid on said lots or any of them thenbefore sold on contract shall become and be due and payable to the purchaser or purchasers of said lot or lots at such sale.

The Trustee out of the proceeds of such sale shall pay:

(a) Expenses of said sale, including counsel's fees and Trustee's fee herein provided for.

(b) All sums which have been paid or advanced under or in accordance with the provisions hereof, and not repaid together with interest aforesaid accrued thereon.

(c) The principal amount due and unpaid to the Seller herein, together with unpaid interest aforesaid accrued thereon.

(d) The remainder of such proceeds, if any to the Buyers, their successors or assigns, according to their respective interests hereunder aforesaid.

SEVENTEENTH: The Buyers shall pay to the Trustee the following fees and compensations for its acceptance of this trust and for acting hereunder:

(a) An installation fee to the Trustee of \$500.00, payable upon the acceptance of this trust.

(b) A fee to the Trustee of \$5.00 per lot for each lot in the aforesaid subdivision, which charge per lot shall cover the cost of making contracts of sale and deeds to purchasers, which the Trustee is authorized to procure from the Seller.

(c) Collection charges payable to the Trustee from the sale price of said lots, which shall be as follows:

One per cent of the amount of all sales for all cash:  
two per cent of the amount of all sales, including interest



under contract where deferred payments are not more than five in number and not extending over a period of more than three years from the date of sale; three per cent on the amount of all sales including interest under contracts calling for more than five payments or extending over more than three years.

(d) An annual fee to the Trustee, commencing with the year 1922, of \$300.00 per year as long as the property aforesaid or any portion thereof is held under this trust, but against such annual fee shall be credited all payments on collection charges, as above set out, as and when moneys from that source shall come into the hands of the Trustee, in any one particular year.

(e) A closing fee of \$200.00 to the Trustee upon the closing of this trust.

EIGHTEENTH: The Trustee hereby agrees to act under the terms of this instrument only upon the following conditions:

That except for its willful default or gross negligence, it shall not be liable to anyone and when in its discretion it acts upon advice of legal counsel selected and employed by it in good faith, in accordance with the opinion of such counsel, it shall not be liable for any result of such action; should it be called upon to perform unlooked for or unanticipated duties in connection with this trust not herein specifically provided for, then in addition to the fees above provided for it shall receive a reasonable compensation for the performance and discharge of such duties; all fees to the Trustee provided for hereunder shall be deemed to be earned upon the execution hereof; the Trustee assumes no obligation and shall be under no obligation whatsoever to pay for or on account of any of the Buyers, or said trust

property or to or for the account of anyone whomsoever, any moneys other than as herein specifically provided, except at its option so to do; this trust shall not cease or terminate unless and until the Trustee shall have been paid in full all sums herein provided to be paid to it.

IN WITNESS WHEREOF, the Merchants Trust Company has caused this instrument to be duly executed by its officers thereunto duly authorized under its corporate seal this first day of July, 1922.

MERCHANTS TRUST COMPANY.

[Seal]

By Emanuel Cohen

President.

By W. E. Gill

Secretary.

Approved:.....

Trust Officer.

The above Declaration of Trust is hereby approved, ratified and confirmed as to all of its terms and provisions.

HELLMAN COMMERCIAL TRUST AND  
SAVINGS BANK.

By F. K. Hulme

Trust Officer.

We hereby certify that the above Declaration of Trust fully sets out all of the terms and provisions thereof, and we hereby ratify, approve and confirm the same in all its parts and hereby respectively agree to do and perform all and everything therein provided to be done by us respectively.

C. C. C. Tatum

Arthur H. Rude

R. M. Hulst

S. M. Folsom

Alexander Pattie

Andy H. Williams

E. J. Gates	W. F. King
Van R. Kelsey	Stanley S. Anderson
Tom S. Ingersoll	Joseph Engert
by R. S. Ingersoll	A. J. Felker
W. M. Lenz	Edwin T. Keiser
H. H. Cotton	W. H. Clune
By Irving H. Hellman	Byron H. Pattison
Atty-in-fact	by Neil Rasmussen,
J. A. LeDoux	his attorney-in-fact
Florence F. Gibbons	

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Trust No. 123-B. N. S.  
Residence

### EX C-1

THIS AGREEMENT, Made in duplicate this.....day  
of....., 19....., between BANK OF AMER-  
ICA OF CALIFORNIA, herein called the "Seller" and  
herein called the "Buyer".

WITNESSETH: That the Seller, in consideration of  
the covenants and agreements hereinafter contained and  
made by and on the part of the Buyer, hereby agrees to  
sell and convey unto the Buyer, all that real property situ-  
ated in the City of Beverly Hills, County of Los Angeles,  
State of California, particularly described as and being:

Lot of Tract Number 4988, as per map  
thereof recorded in Book 54, Page 99 of Maps in the office  
of the County Recorder of said county.

Excepting therefrom, however, an easement in favor of  
the Seller, its successors and assigns, for a right of way  
over and across the rear four feet of said premises for the

purpose of erecting and maintaining thereon, poles for light, power, telephone and telegraph lines, and for other public utilities;

And the Buyer, in consideration of the premises, agrees to buy and pay to the Seller therefor, in its office at 650 South Spring Street in the City of Los Angeles, California, the sum of

Dollars (\$) )

Dollars (\$) )

as follows:

upon the execution and delivery of this Agreement, receipt of which is hereby acknowledged, and the further sum of

Dollars (\$) )

together with interest from date on unpaid balances, at the rate of seven (7) per cent. per annum, payable quarterly.

Buyer agrees to pay all taxes or assessments of every kind levied, assessed or which may hereafter become due against the said described premises.

No representations, inducements or agreements made by anyone, not specifically set out herein, shall be binding against the Seller.

This agreement is made subject to the following conditions and covenants, which shall be set forth in the deed to be made in pursuance hereof, as follows:

That said premises shall be used for no purpose other than for the erection and maintenance thereon of a first class single private residence, with the customary out-buildings in the rear thereof; that such residence shall cost and be fairly worth not less than \$ , and shall face the front line of the lot; that no such residence, nor any projection thereof, other than the front steps, shall be less than twenty-five feet from the front line, nor shall the



same be less than four feet from either side line; that no outbuilding shall be occupied as a dwelling until a residence be in process of erection upon said premises, nor for a period of time longer than is reasonably necessary for the completion of such residence.

That all buildings and fences shall be of new material and, if frame, be painted or stained at least two coats upon completion.

The foregoing stipulations and conditions shall terminate January 1st, 1950, and thereafter be of no further force or effect.

Said premises shall never be conveyed to, or come into the possession of, any person except of the Caucasian race, nor be occupied by such person unless in the employ of the owner or his tenant residing thereon.

The foregoing stipulations and conditions shall be deemed to be covenants running with the land in favor of the Seller, and the breach of any of the same shall cause title to said premises to revert to the Seller, its successors and assigns, each of whom, respectively, shall have the right of immediate re-entry upon said premises.

IT IS UNDERSTOOD AND AGREED that time is of the essence of this Agreement and that such provision shall not be waived if the Seller accept payments hereon after same have become delinquent or gives extensions of time to the Buyer. If the Buyer fails to make any of the payments at the times and in the manner above provided, or fails to comply with any of the terms hereof on his part to be done or performed, then the Seller may declare all moneys provided to be paid hereunder immediately due and payable, and may forthwith proceed to enforce the terms of this Agreement by appropriate action, whereby the

Buyer shall be deemed to have forfeited all rights hereunder and all right to the money theretofore paid upon this Agreement, which money may be retained by the Seller, and the Seller shall be relieved from all obligations in law or equity to convey said property; but the Seller, on receiving the full payments at the times and in the manner above provided, agrees to deliver to the Buyer a good and sufficient deed of conveyance of said premises, and to deliver a Guarantee of Title showing the title to be vested in the Seller free and clear of encumbrance suffered or done by it except as herein mentioned.

Buyer hereby warrants that.....is of legal age at the date of the execution of this agreement.

IN WITNESS WHEREOF, This Agreement has been executed by the Seller by its officers thereunto duly authorized under its seal, and the Buyer has executed the same the day and year first above written.

BANK OF AMERICA OF CALIFORNIA

By.....  
Vice-President.

By.....  
Asst. Trust Officer

.....  
Buyer

.....  
Buyer

Address.....

(Reverse of Agreement):

(NOTE: The marital status of the parties to any Assignment must be shown and if Assignor is married the wife or husband must also sign.)

Assignment  
Los Angeles, Calif.

Assignee's Acceptance

.....19.....  
For value received, I,.....  
.....do hereby grant  
and assign to.....  
.....all.....right, title  
and interest in and to the  
foregoing Agreement and in  
and to the property therein  
described.

The undersigned assignee  
named in the Assignment of  
the foregoing Agreement,  
hereby approves and accepts  
the same subject to all the  
terms, covenants and condi-  
tions thereof.

.....  
.....  
.....Address.....

### SELLER'S CONSENT

The BANK OF AMERICA OF CALIFORNIA,  
owner of the property described in the foregoing Agree-  
ment, hereby consents to the foregoing assignment.

BANK OF AMERICA OF CALIFORNIA  
By.....

Trust No. 123-B N. S.  
AGREEMENT FOR THE SALE OF REAL  
PROPERTY  
BANK OF AMERICA OF CALIFORNIA  
with

Dated

Lot .....  
Tract No. 4988  
BANK OF AMERICA OF CALIFORNIA  
650 South Spring Street  
Los Angeles, Calif.

All remittances or payments on this contract to be made to  
Bank of America of California

PAYMENTS

PAYMENTS  
(same as first  
column here  
shown)

Date	Interest	Amount	Credited on	Balance	Rec'd
Paid	Paid to	Paid	Interest	Principal	By





unpaid balances, at the rate of seven (7) per cent. per annum, payable quarterly.

Buyer agrees to pay all taxes or assessments of every kind levied, assessed or which may hereafter become due against the said described premises.

No representations, inducements or agreements made by anyone, not specifically set out herein, shall be binding against the Seller.

This agreement is made subject to the following conditions and covenants, which shall be set forth in the deed to be made in pursuance hereof, as follows:

That said premises shall be used for no purpose other than for the erection and maintenance thereon of a single private residence, bungalow court, double bungalow, double or duplex house, or flat, to be used exclusively for residence purposes, with the customary outbuildings in the rear thereof; it being provided: that no single residence shall cost or be fairly worth less than Three Thousand Dollars (\$3,000.00); that each dwelling of a bungalow court shall cost and be fairly worth, per family unit thereof, at least One Thousand Two Hundred Dollars (\$1,200.00) per front unit, and that the rear units of such court shall each cost and be fairly worth not less than seventy-five per centum (75%) of the stipulated cost of a front unit, and that any double unit shall cost and be fairly worth not less than seventy-five per centum (75%) of the cost of two single units and that the construction of at least three of the dwellings of a bungalow court shall be commenced and carried on at the same time; that a double bungalow shall cost and be fairly worth not less than Three Thousand Five Hundred Dollars; (\$3,500.00); that a double house or duplex house shall

cost or be fairly worth not less than Four Thousand Five Hundred Dollars (\$4,500.00); that a flat shall cost and be fairly worth not less than Six Thousand Dollars (\$6,000.00).

No outbuilding shall be occupied as a dwelling until a residence be in process of erection upon said premises, nor for a period of time longer than is reasonably necessary for the completion of such residence.

All buildings and fences shall be of new material and, if frame, be painted or stained at least two coats upon completion.

Or for the erection and maintenance thereon of a store or office building, the same to be used or occupied for professional, commercial or mercantile business purposes not prohibited by law or ordinance, except that the second or higher stories of said buildings may be used and occupied as apartments or flats and that living rooms may be constructed in the rear of store or office rooms occupying the first floor of any such building and may be used as living quarters during such time as a professional, commercial or mercantile business is being carried on in the store or office room behind which such living rooms are located. That any such store or office building shall be a first class permanent structure of new material and the exterior walls thereof shall be of brick, tile, concrete or other fire resisting material and the same shall cost and be fairly worth not less than \$

The foregoing stipulations and conditions shall terminate January 1st, 1950, and thereafter be of no further force or effect.

Said premises shall never be conveyed to, or come into the possession of, any person except of the Caucasian

race, nor be occupied by such person unless in the employ of the owner or his tenant residing thereon.

The foregoing stipulations and conditions shall be deemed to be covenants running with the land in favor of the Seller, and the breach of any of the same shall cause title to said premises to revert to the Seller, its successors and assigns, each of whom, respectively, shall have the right of immediate re-entry upon said premises.

IT IS UNDERSTOOD AND AGREED that time is of the essence of this Agreement and that such provision shall not be waived if the Seller accept payments hereon after the same have become delinquent or gives extensions of time to the Buyer. If the Buyer fails to make any of the payments at the times and in the manner above provided, or fails to comply with any of the terms hereof on his part to be done or performed, then the Seller may declare all moneys provided to be paid hereunder immediately due and payable, and may forthwith proceed to enforce the terms of this Agreement by appropriate action, whereby the Buyer shall be deemed to have forfeited all rights hereunder and all right to the money theretofore paid upon this Agreement, which money may be retained by the Seller, and the Seller shall be relieved from all obligations in law or equity to convey said property; but the Seller, on receiving the full payments at the times and in the manner above provided, agrees to deliver to the Buyer a good and sufficient deed of conveyance of said premises, and to deliver a Guarantee of Title showing the title to be vested in the Seller free and clear of encumbrance suffered or done by it except as herein mentioned.

Buyer hereby warrants that \_\_\_\_\_ is of legal age at the date of the execution of this agreement.

IN WITNESS WHEREOF, This Agreement has been executed by the Seller by its officers thereunto duly authorized under its seal, and the Buyer has executed the same the day and year first above written.

BANK OF AMERICA OF CALIFORNIA

By.....

Vice-President.

By.....

Asst. Trust Officer.

.....  
Buyer.

.....  
Buyer.

Address.....

(ON REVERSE SIDE)

ALL REMITTANCES OR PAYMENTS ON THIS  
CONTRACT TO BE MADE TO BANK OF  
AMERICA OF CALIFORNIA

PAYMENTS

PAYMENTS  
(same as first  
column here  
shown)

Date	Interest	Amount	Credited on	Balance	Rec'd
Paid	Paid to	Paid	Interest	Principal	By

Trust No. 123-B N. S.

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AGREEMENT FOR THE SALE  
OF REAL PROPERTY

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BANK OF AMERICA  
OF CALIFORNIA  
WITH

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Dated

Lot.....

TRACT No. 4988

BANK OF AMERICA

of California

650 South Spring Street

Los Angeles, Calif.

(NOTE: The marital status of the parties to any assignment must be shown and if Assignor is married the wife or husband must also sign.)

ASSIGNMENT

:

ASSIGNEE'S  
ACCEPTANCE

Los Angeles, Calif.,.....19.... : The undersigned as-  
 For value received, I,..... : signee named in the  
 ..... : Assignment of the  
 do hereby grant and assign to..... : foregoing Agreement,  
 ..... : hereby approves and  
 all.....right, title and interest : accepts the same sub-  
 in and to the foregoing Agree- : ject to all the terms,  
 ment and in and to the property : covenants and condi-  
 therein described. : tions thereof.

..... :  
 ..... :  
 ..... : Address.....

## SELLER'S CONSENT

The BANK OF AMERICA OF CALIFORNIA,  
 owner of the property described in the foregoing Agree-  
 ment, hereby consents to the foregoing assignment.

BANK OF AMERICA OF CALIFORNIA

By.....



unpaid balances, at the rate of seven (7) per cent. per annum, payable quarterly.

Buyer agrees to pay all taxes or assessments of every kind levied, assessed or which may hereafter become due against the said described premises.

No representations, inducements or agreements made by anyone, not specifically set out herein, shall be binding against the Seller.

This agreement is made subject to the following conditions and covenants, which shall be set forth in the deed to be made in pursuance hereof, as follows:

That said premises shall be used for no purpose other than for the erection and maintenance thereon of a single private residence, bungalow court, double bungalow, double or duplex house, or flat, to be used exclusively for residence purposes, with the customary outbuildings in the rear thereof; it being provided: that no single residence shall cost or be fairly worth less than Three Thousand Dollars (\$3,000.00); that each dwelling of a bungalow court shall cost and be fairly worth, per family unit thereof, at least One Thousand Two Hundred Dollars (\$1,200.00) per front unit, and that the rear units of such court shall each cost and be fairly worth not less than seventy-five per centum (75%) of the stipulated cost of a front unit, and that any double unit shall cost and be fairly worth not less than seventy-five per centum (75%) of the cost of two single units and that the construction of at least three of the dwellings of a bungalow court shall be commenced and carried on at the same time; that a double bungalow shall cost and be fairly worth not less than Three Thousand Five Hundred Dollars; (\$3,500.00); that a double house or duplex house shall

cost or be fairly worth not less than Four Thousand Five Hundred Dollars (\$4,500.00); that a flat shall cost and be fairly worth not less than Six Thousand Dollars (\$6,000.00).

No outbuilding shall be occupied as a dwelling until a residence be in process of erection upon said premises, nor for a period of time longer than is reasonably necessary for the completion of such residence.

All buildings and fences shall be of new material and, if frame, be painted or stained at least two coats upon completion.

Or for the erection and maintenance thereon of a store or office building, the same to be used or occupied for professional, commercial or mercantile business purposes not prohibited by law or ordinance, except that the second or higher stories of said buildings may be used and occupied as apartments or flats and that living rooms may be constructed in the rear of store or office rooms occupying the first floor of any such building and may be used as living quarters during such time as a professional, commercial or mercantile business is being carried on in the store or office room behind which such living rooms are located. That any such store or office building shall be a first class permanent structure of new material and the exterior walls thereof shall be of brick, tile, concrete or other fire resisting material and the same shall cost and be fairly worth not less than \$

The foregoing stipulations and conditions shall terminate January 1st, 1950, and thereafter be of no further force or effect.

Said premises shall never be conveyed to, or come into the possession of, any person except of the Caucasian



race, nor be occupied by such person unless in the employ of the owner or his tenant residing thereon.

The foregoing stipulations and conditions shall be deemed to be covenants running with the land in favor of the Seller, and the breach of any of the same shall cause title to said premises to revert to the Seller, its successors and assigns, each of whom, respectively, shall have the right of immediate re-entry upon said premises.

IT IS UNDERSTOOD AND AGREED that time is of the essence of this Agreement and that such provision shall not be waived if the Seller accept payments hereon after the same have become delinquent or gives extensions of time to the Buyer. If the Buyer fails to make any of the payments at the times and in the manner above provided, or fails to comply with any of the terms hereof on his part to be done or performed, then the Seller may declare all moneys provided to be paid hereunder immediately due and payable, and may forthwith proceed to enforce the terms of this Agreement by appropriate action, whereby the Buyer shall be deemed to have forfeited all rights hereunder and all right to the money theretofore paid upon this Agreement, which money may be retained by the Seller, and the Seller shall be relieved from all obligations in law or equity to convey said property; but the Seller, on receiving the full payments at the times and in the manner above provided, agrees to deliver to the Buyer a good and sufficient deed of conveyance of said premises, and to deliver a Guarantee of Title showing the title to be vested in the Seller free and clear of encumbrance suffered or done by it except as herein mentioned.

Buyer hereby warrants that \_\_\_\_\_ is of legal age at the date of the execution of this agreement.

IN WITNESS WHEREOF, This Agreement has been executed by the Seller by its officers thereunto duly authorized under its seal, and the Buyer has executed the same the day and year first above written.

BANK OF AMERICA OF CALIFORNIA

By.....

Vice-President.

By.....

Asst. Trust Officer.

.....  
Buyer.

.....  
Buyer.

Address.....

(ON REVERSE SIDE)

ALL REMITTANCES OR PAYMENTS ON THIS  
CONTRACT TO BE MADE TO BANK OF  
AMERICA OF CALIFORNIA

PAYMENTS

PAYMENTS  
(same as first  
column here  
shown)

Date	Interest	Amount	Credited on	Balance	Rec'd
Paid	Paid to	Paid	Interest	Principal	By

Trust No. 123-B N. S.

---

AGREEMENT FOR THE SALE  
OF REAL PROPERTY

---

BANK OF AMERICA  
OF CALIFORNIA  
WITH

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Dated

Lot.....

TRACT No. 4988

BANK OF AMERICA

of California

650 South Spring Street

Los Angeles, Calif.

(NOTE: The marital status of the parties to any assignment must be shown and if Assignor is married the wife or husband must also sign.)

ASSIGNMENT : ASSIGNEE'S  
ACCEPTANCE

Los Angeles, Calif.,.....19.... : The undersigned as-  
 For value received, I,..... : signee named in the  
 ..... : Assignment of the  
 do hereby grant and assign to..... : foregoing Agreement,  
 ..... : hereby approves and  
 all.....right, title and interest : accepts the same sub-  
 in and to the foregoing Agree- : ject to all the terms,  
 ment and in and to the property : covenants and condi-  
 therein described. : tions thereof.

\_\_\_\_\_ : \_\_\_\_\_  
 \_\_\_\_\_ : \_\_\_\_\_  
 \_\_\_\_\_ : Address \_\_\_\_\_

### SELLER'S CONSENT

The BANK OF AMERICA OF CALIFORNIA, owner of the property described in the foregoing Agreement, hereby consents to the foregoing assignment.

BANK OF AMERICA OF CALIFORNIA

By \_\_\_\_\_

Ex. D.

Exhibit "D"

(EXECUTE SEPARATE FORM FOR EACH TAX  
PERIOD)

CLAIM FOR

TREASURY DE- PARTMENT Internal Revenue Service Form 843—Jan., 1922 Comptroller General U. S. January 18, 1922	<input type="checkbox"/> ABATEMENT OF TAX ASSESSED  <input type="checkbox"/> CREDIT AGAINST OUTSTANDING ASSESSMENTS  <input type="checkbox"/> REFUND OF TAXES ILLEGALLY COLLECTED  <input type="checkbox"/> REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS
--	--

**IMPORTANT**

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

NOTICE TO COLLECTOR  
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by  
Administrative  
Unit

Stamp here

State of California }  
County of Los Angeles } ss:

TRUST NO. 123 B. N. S.—  
MERCHANTS TRUST COM-  
PANY TRUSTEE  
(Name of taxpayer or purchaser  
of stamps.)

COLLECTOR'S NOTATION
District
Account number
Date received
RECEIVED April 18, 1929 INTERNAL REVENUE 6th California. Stamp here
----- Collector of Internal Revenue



TYPE OR PRINT
---------------------

660 South Spring Street,  
(Residence—give street and number as  
well as city or town and state.)  
Los Angeles, California.

(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From: Dec. 31	1927
To: Jan. 1	1929

1. Business in which engaged      Subdivision
2. Character of assessment or tax      Income tax  
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased ..... \$5712.65
4. Reduction of Tax Liability requested  
(Income and Profits Tax) ..... \$5712.65
5. Amount to be abated ..... \$ .....
6. Amount to be refunded (or such greater amount as is legally refundable) ..... \$5712.65
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) .....  
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed      Sixth District
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit \$ .....
11. Unpaid assessment against which credit is asked; period from ..... to ..... \$ .....

Deponent verily believes that this application should be allowed for the following reasons:

The above amount does not include interest in the amount of \$28.56 representing interest at 6% on said \$5712.65 for one month on account of an extension of thirty days allowed by the Collector. Claim for refund of this amount is also made herewith.

The Commissioner has erroneously determined this trust to be taxable as an association. This trust constitutes a joint venture and is not taxable as an association for the calendar year 1928 or for any other year. In addition, the Commissioner has erroneously determined that there was a measure of profit or loss accrued to the trust from the sale of each lot and included the same in the gross income.

(Attach additional sheets if necessary.)

Signed: MERCHANTS TRUST COMPANY, Trustee,

By: H. H. Ashley, (Sgd)  
Vice President.

L. S. Colyer (Sgd)  
Secretary

Sworn to and subscribed before me this 17th day of April, 1929

Emil Barud (Sgd)

Notary Public in and for the County of Los Angeles,  
State of California.

(Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

## Ex. E

Trust No. 123-B. N. S. Residence

## DEED

The MERCHANTS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, as successor to Hellman Commercial Trust and Savings Bank, for and in consideration of Ten Dollars (\$10.00) to it in hand paid, the receipt of which is hereby acknowledged, does hereby grant to

all that real property situated in the City of Beverly Hills,  
County of Los Angeles, State of California, described  
as and being:

Lot \_\_\_\_\_ of Tract Number 4988, as per map thereof recorded in Book 54, page 99, of Maps in the office of the County Recorder of said county;

Excepting therefrom, however, an easement in favor of the Grantor, its successors and assigns, for a right of way over and across the rear four feet of said premises for the purpose of erecting and maintaining thereon, poles for light, power, telephone and telegraph lines, and for other public utilities.

This conveyance is made subject to:

This conveyance is made and accepted upon each of the following conditions, which shall apply to and be binding upon the Grantee, his heirs, devisees, executors, administrators and assigns, namely:

That said premises shall be used for no purpose other than for the erection and maintenance thereon of a first class single private residence, with the customary out-buildings in the rear thereof; that such residence shall cost and be fairly worth not less than \$

and shall face the front line of the lot; that no such residence, nor any projection thereof, other than the front steps, shall be less than twenty-five feet from the front line, nor shall the same be less than four feet from either side line; that no outbuilding shall be occupied as a dwelling until a residence be in process of erection upon said premises, nor for a period of time longer than is reasonably necessary for the completion of such residence.

That all buildings and fences shall be of new material and, if frame, be painted or stained at least two coats upon completion.

The foregoing stipulations and conditions shall terminate January 1st, 1950, and thereafter be of no further force or effect.

Said premises shall never be conveyed to, or come into the possession of, any person except of the Caucasian race, nor be occupied by such person unless in the employ of the owner or his tenant residing thereon.

The foregoing stipulations and conditions shall be deemed to be covenants running with the land in favor of the Grantor and the breach of any of the same shall cause said premises to revert to the Grantor, its successors and assigns, each of whom, respectively, shall have the right of immediate re-entry upon said premises.

The breach of any of the foregoing stipulations and conditions, or any re-entry by reason of such breach, shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value; however, the breach of any of said stipulations or conditions or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings, and each of the foregoing stipulations and conditions shall be, at



all times, in full force and effect as against any owner of said premises, or any part thereof, whether such ownership be acquired by purchase, foreclosure, devise, inheritance or in any other manner.

IN WITNESS WHEREOF, the said Merchants National Trust and Savings Bank of Los Angeles has caused this deed to be executed by its officers thereunto duly authorized, this                      day of

MERCHANTS NATIONAL TRUST AND SAVINGS  
BANK OF LOS ANGELES

By.....

Vice-President.

By.....

Asst. Cashier.

STATE OF CALIFORNIA,    }  
COUNTY OF LOS ANGELES } ss.

On this                      day of                      19    ,  
before me    a Notary Public  
in and for said County and State, residing therein, duly  
commissioned and sworn, personally appeared

known to me to be the Vice-President, and

known to me to be the

Assistant Cashier of Merchants National Trust and Savings Bank of Los Angeles, the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

-----  
Notary Public in and for said County and State.

Lot No.....

Tract 4988

Trust No. 123-B N. S.

DEED

MERCHANTS NATIONAL TRUST AND SAVINGS  
BANK OF LOS ANGELES  
TO

-----  
-----  
-----

Dated

MERCHANTS NATIONAL TRUST AND SAVINGS  
BANK OF LOS ANGELES

A consolidation of Hellman Commercial Trust and Sav-  
ings Bank and the Merchants National Bank  
of Los Angeles.

650 South Spring Street, Los Angeles, Cal.

When recorded, please mail this deed to

-----  
-----  
-----

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Ex. F.

NOTICE: Assignments must be executed in duplicate  
and both copies presented to the Trustee for endorsement;  
one copy for the Trustee and one copy for the Assignee

ASSIGNMENT OF BENEFICIAL INTEREST

FOR VALUE RECEIVED, .....

.....do hereby assign,  
transfer and set over unto.....  
an undivided..... (.....)  
Interest (the same being.....of.....entire

Interest) in and to that certain Declaration of Trust issued by the..... under its Trust No. .... which said Declaration of Trust covers the following described property, to-wit:

AND.....do also hereby assign, transfer and set over unto said..... an undivided ..... (.....) interest (the same being ..... of ..... entire Interest) in and to the proceeds and avails arising or growing out of the said Declaration of Trust No....., and do hereby authorize the said Merchants Trust Company to pay and turn over unto said..... all moneys and benefits growing out of the said Interest hereby conveyed.

This assignment is made, however, subject to all of the terms and conditions of said Declaration of Trust No.....

Dated.....19.....

.....

.....

.....

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### ASSIGNEE'S ACCEPTANCE

..... do hereby accept the above Assignment to..... of said undivided..... (.....) interest in and to said Declaration of Trust No....., and do also hereby agree

to and do approve, ratify and confirm the said Trust agreement in all particulars.

Dated.....19.....

.....  
Address.....

.....  
Address.....

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### TRUSTEE'S ENDORSEMENT

The duplicate of this Assignment filed in the Trust Department of the Merchants Trust Company this..... day of ....., 19.....

MERCHANTS TRUST COMPANY

.....Asst. Cashier

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TRUST NO.....

ASSIGNMENT OF BENEFICIAL INTEREST

.....

.....

TO

.....

.....

Dated.....19.....

---

Ex. G.

COLLATERAL ASSIGNMENT OF BENEFICIAL  
INTEREST UNDER TRUST

---

THIS AGREEMENT, Made in duplicate this..... day of ..... A. D. 192.....

BETWEEN .....  
..... Assignor.....



MERCHANTS TRUST COMPANY, and having its principal place of business in Los Angeles, California, the Trustee, and .....

..... Payee.....

WITNESSETH: THAT WHEREAS, said Assignor  
.....indebted to said Payee..... in the sum of  
..... Dollars

and ha..... agreed to pay the same, with interest, according to the terms of.....promissory note....., given by

.....  
.....  
.....  
for said amount, dated.....due.....  
with interest at.....per cent, per annum, payable  
.....in favor of said Payee.....

.....  
.....  
NOW, THEREFORE, for the purpose of securing the payment thereof, and also to secure the repayment of such additional sums, with interest thereon, as may be hereafter borrowed and received by said Assignor..... from said Payee..... and evidenced by another promissory note or notes or otherwise, or advanced by said Payee..... to protect his interests hereunder, said Assignor..... do..... by these presents hereby assign, transfer and set over unto said Trustee an undivided..... interest in and to that certain Declaration of Trust issued by the said..... under its Trust No....., affecting that certain .....property, described as follows: .....

-----  
-----  
-----  
-----  
Together with a like interest in and to the proceeds and  
avails arising or growing out of said Trust, and hereby  
authorize..... said Trustee to pay and turn over unto said  
Payee..... all moneys and benefits growing out of said  
interest hereby assigned as a payment on the aforesaid  
indebtedness, subject to all of the terms and conditions  
of said Declaration of Trust.....  
-----  
-----

-----  
-----  
Upon full payment of the indebtedness aforesaid to-  
gether with all other sums secured or intended to be  
secured hereby and upon delivery to said Trustee of  
written notice from the holder..... of said note....., or  
other evidences of indebtedness as hereinabove referred  
to and of the full payment thereof and upon the sur-  
render of the said note..... or other evidences of indebted-  
ness to said Trustee for cancellation, and upon payment  
on demand of all other sums secured or intended to be  
secured hereby, then said Trustee shall re-assign to said  
Assignor..... the interest in said Trust hereby assigned.

If default should be made in the payment of any sums  
of principal or interest secured hereby when due, then  
said Trustee on written demand of the holder of said  
note..... or other evidences of indebtedness, but without  
the necessity of making demand on said Assignor..... for  
the payment thereof, shall sell the interest in said Trust,  
or such part thereof as it shall deem necessary to sell in  
order to pay the same.

Such sale shall be made in the following manner, namely:

Said Trustee shall publish notice of the time and place of such sale, with a description of the interest in said Trust to be sold, at least once a week for three successive weeks in some newspaper published in the City of Los Angeles, California, and may from time to time postpone such sale by publication of a notice of postponement in the same newspaper in one issue only prior to the date of the sale fixed by said notice of postponement, or at its option, by public announcement thereof at the time and place of sale so advertised; and on the day of sale so fixed said Trustee may sell said interest or any portion thereof at public auction, to the highest bidder for cash in gold coin, and after such sale and after due payment made, said Trustee shall execute and deliver to the purchaser or purchasers an assignment or assignments of the interest or interests in said Trust so sold to such purchaser or purchasers, subject to all of the terms and conditions thereof.

AND out of the proceeds of such sale or sales shall pay:

First: The costs, fees, charges and expenses of such sale.

Second: The amount due and unpaid on said note..... or other evidences of indebtedness, with interest accrued thereon.

Third: Any additional sums, with interest accrued thereon, borrowed by said Assignor.... from said Payee....., evidenced by another note or notes, or other evidences of indebtedness, as hereinbefore provided.

And, lastly, the balance, if any, to the order of the said Assignor.....

In the event of a sale of said interest, or any part thereof, and the execution of any assignment or assignments therefor, then the recitals therein of default, publication of notice of sale, demand that such sale should be made, postponement of sale, terms of sale, sale, purchaser, payment of purchase money, and any other fact affecting the regularity or validity of such sale shall be conclusive proof of such facts.

Demand, presentment, notice, protest and notice of protest are hereby waived.

-----  
-----  
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### PAYEE'S APPROVAL

I

We, -----  
the Payee..... in the above described Note..... do.....  
hereby agree and do..... approve, ratify and confirm the  
foregoing Assignment and the said Trust Agreement in  
all its particulars.

Dated.....A. D. 192.....

-----  
-----



TRUSTEE'S ENDORSEMENT

The foregoing Trust is hereby accepted and the duplicate of this Assignment filed in the Trust Department of the Merchants Trust Company this.....day of ....., A. D. 192.....

MERCHANTS TRUST COMPANY

By.....  
Trust Officer.

TRUST NO.....

COLLATERAL ASSIGNMENT OF BENEFICIAL  
INTEREST

.....  
.....

TO

.....  
.....

DATED

MERCHANTS NATIONAL TRUST AND SAVINGS  
BANK OF LOS ANGELES

A consolidation of Hellman Commercial Trust and  
Savings Bank and the Merchants National  
Bank of Los Angeles

EX. H.

COPY

TRUSTEE'S CERTIFICATE OF BENEFICIAL  
INTEREST UNDER TRUST

This is to certify that FRANCISCO and ELLINGTON, Incorporated, a corporation, is the owner of an undivided ten one hundred fiftieths (10/150ths) beneficial interest in and under that certain Declaration of Trust issued by the Merchants Trust Company, a corporation organized and existing under the laws of the State of California, under its Trust No. 123B-N.S., under which the following described property is held in trust by said Trust Company subject to the terms of the Declaration of Trust issued by it in connection therewith, and that the said FRANCISCO and ELLINGTON, Incorporated, a corporation, is entitled to ten one hundred fiftieths (10/150ths) of the proceeds realized from the sale of said property in accordance with the provisions of said Declaration of Trust, said property being described as follows:

Lots One (1) to Three Hundred seventy-five (375) inclusive, and lots Five hundred eighty-seven (587) to Eight hundred ninety-six (896) inclusive, in Tract 4988 as per map of said Tract recorded in Book 54, pages 98 and 99 of Maps, Records of Los Angeles County, California.

In Witness Whereof, the MERCHANTS TRUST COMPANY, has caused this Certificate to be duly executed by its Secretary, thereunto duly authorized, this 13th day of April, 1923.

MERCHANTS TRUST COMPANY.

By.....

Secretary.

EX. I

NOTICE

You are hereby notified, as holder of a..... beneficial interest in and to Declaration of Trust 123-b N. S. of Hellman Commercial Trust and Savings Bank, commonly referred to as the "Tatum Trust", that the Trustee has been advised that the sum of \$77,879.94 is now due and payable to Francisco and Ellington, for certain street work which has been done on said property, and bill therefor regularly approved by the agent or attorney in fact appointed under the Declaration of Trust.

The sum of \$75,000.00 of said amount is being demanded therefore by said Francisco and Ellington from the owners of the property.

Said Declaration of Trust provides that the buyers severally bind themselves to pay as and when due all sums, in proportion to their respective beneficial interest necessary for the subdivision and improvement of said property, and that such sums are payable immediately by said buyers upon demand made upon them by the Trustee, together with interest thereon from the date of said demand.

In accordance with the terms of said Declaration of Trust, demand is hereby made upon you for the sum of \$....., being the pro rata amount for which your interest is liable, in order to pay Francisco and Ellington, Incorporated, said \$75,000 on account of said demand.

Said payment should be made to Hellman Commercial Trust and Savings Bank on or before March 10, 1924.

Said Declaration of Trust provides that in the event any Buyer or syndicate owner under said Trust shall fail to pay his proportionate share of such amounts as may be due and payable as aforesaid, any other beneficiary under said trust may pay the same, and demand that the Trustee sell the interest of such defaulting Buyer, in accordance with the terms and provisions of sale set forth in said Declaration of Trust.

---

Ex. J.

-1-

TRUST #123 B N. S.

PAYMENTS MADE BY TRUSTEE FOR IMPROVE-  
MENTS ON TRACT AS SHOWN IN  
TRUSTEE'S RECORDS:

TO FRANSISCO AND ELLINGTON—CONSTRUC-  
TION WORK:

<u>Year:</u>	<u>Amount:</u>
1922	\$22,118.13
1923	26,055.51
1924	96,285.29
1925	4,469.76
Total	<u>\$148,928.69</u>

TO C. C. C. TATUM—IMPROVEMENTS:

<u>Year:</u>	<u>Amount:</u>
1923	\$122,456.79
1924	10,000.00
1926	215.00
Total	<u>\$132,671.79</u>



TO R. J. LASHBROOKE—ENGINEERING  
SERVICE:

<u>Year:</u>	<u>Amount:</u>
1922	\$ 2,276.33
1923	4,754.00
1924	932.68
1925	337.00
1926	3,450.00
	<hr/>
Total	\$ 11,750.01

---

TRUST #123 B-N. S.

-2-

SUMMARY OF RECEIPTS AND DISBURSE-  
MENTS 1922, AS PER TRUSTEE'S RECORDS:

Cash on hand at inception—Preliminary Escrow	\$4,450.00
--	------------

RECEIPTS:

Collection on sales	142,929.97
	<hr/>
Total	\$147,379.97

DISBURSEMENTS:

Commission	\$25,021.80	
Interest	15,845.68	
Trustee fees	3,082.81	
Discount	816.06	
Paid on indebtedness	54,700.00	
Improvements	40,961.10	
Misc. expense	5,663.20	146,090.65
	<hr/>	<hr/>
Cash on hand Dec. 31, 1922		\$ 1,289.32

LOT  
RECORD OF ~~LATE~~ SALES:

Number of lots in Tract at inception of Trust	685
Number of lots sold in 1922	134
	<hr/>
Number of lots unsold Dec. 31, 1922	551

TRUST #123 B-N. S. -3-

SUMMARY OF RECEIPTS AND DISBURSE-  
MENTS 1923, AS PER TRUSTEE'S RECORDS:

Cash on hand Jan. 1, 1923	\$ 1,289.32
---------------------------	-------------

RECEIPTS:

Collections on sales	\$457,515.30	
Deposits by beneficiaries	15,832.61	
Taxes collected	197.02	
	<hr/>	473,544.93
		<hr/>
Total		\$474,834.25

DISBURSEMENTS:

Interest paid	\$ 11,944.92	
Taxes paid	4,520.87	
Commission paid Smith	38,890.02	
Commission paid Tatum	88,479.42	
Trustees fees	5,834.17	
Title charges	756.71	
Paid on indebtedness	139,000.00	
Improvements	176,500.71	
	<hr/>	465,926.82
		<hr/>
Balance Dec. 31, 1923		\$ 8,907.43

LOT

RECORD OF ~~LATE~~ SALES:

Number of lots unsold Jan. 1, 1923	551
Number of lots sold, 1923	402
	<hr/>
Number of lots unsold Dec. 31, 1923	149

TRUST #123 B-N. S.

-4-

SUMMARY OF RECEIPTS AND DISBURSEMENTS 1924, AS PER TRUSTEE'S RECORDS:

Cash on hand Jan. 1, 1924	\$ 8,907.43
---------------------------	-------------

## RECEIPTS:

Collected on sales	\$403,045.45	
Deposit by beneficiaries	75,000.00	
Refunds on improvements	1,865.00	
Loan	2,177.40	
Water plant	37,801.03	
Rents	762.00	
Taxes	2,071.70	
Other receipts	1,295.34	
Title charges	266.54	
	<hr/>	524,284.46
		<hr/>
Total		\$533,191.89

## DISBURSEMENTS:

Interest	\$ 2,436.39	
Taxes	6,072.37	
Commission	74,587.04	
Trustee's fees	14,608.78	
Discounts	2,050.00	
Corrections	273.46	
Title charges	1,496.06	
Attorney's fees	125.00	
Paid on indebtedness	86,085.00	
Improvements	112,294.01	
Beneficiaries	100,000.00	
Refund of advance by Cotton with interest	2,286.27	
Refund of first assessment	19,357.62	
Refund of second assessment	75,000.00	
	<hr/>	496,672.00
Balance Dec. 31, 1924		<hr/> \$ 36,519.89

*Galen H. Welch, Collector, etc.* 111

RECORD OF LOT SALES:

Number of lots unsold Jan. 1, 1924	149
Number of lots sold, 1924	33
	<hr/>
	116
Number of lots repossessed 1924	4
	<hr/>
	120
Number of lots resold 1924	1
	<hr/>
Number of lots unsold Dec. 31, 1924	119

TRUST #123 B-N. S. -5-

SUMMARY OF RECEIPTS AND DISBURSEMENTS 1925, AS PER TRUSTEE'S RECORDS:

Cash on hand Jan. 1, 1925 \$ 36,519.89

RECEIPTS:

Collections on sales	\$407,419.78	
Interest	20,483.04	
Refunds on water connections	875.00	
Refunds on gas and electric connections	2,545.00	
Deposit by beneficiaries	2,500.00	
	<hr/>	433,822.82
Total		<hr/>
		\$470,342.71

DISBURSEMENTS:

Commission	\$ 69,544.35
Taxes	3,416.16
Title expense	2,947.90
Trustee's fees	8,106.85
Assessments	639.36



112      *Merchants Trust Company, Trustee, vs.*

Discount	5,212.50	
Attorneys fees	2,960.00	
Improvements	8,152.67	
Paid to beneficiaries	360,000.00	
	<hr/>	460,979.79
		<hr/>
Cash on hand Dec. 31, 1925		\$ 9,362.92

RECORD OF LOT SALES:

Number of lots unsold Jan. 1, 1925	119
Number of lots sold 1925	20½
	<hr/>
	98½
Number of lots resold 1925	1
	<hr/>
Number of lots unsold Dec. 31, 1925	97½

TRUST #123 B-N. S. -6-

SUMMARY OF RECEIPTS AND DISBURSEMENTS 1926, AS PER TRUSTEE'S RECORDS:

Cash on hand Jan. 1, 1926      \$ 9,362.92

RECEIPTS:

Collection on sales	\$169,503.40
Interest	11,470.77
Taxes	172.26
Buyers costs	134.70

Assessments	28.44	
Liberty bond interest	61.50	
Refund of deposits	2,675.62	
	<hr/>	184,046.69
Total		<hr/> \$193,409.61

DISBURSEMENTS:

Commission	\$ 59,654.42	
Amount invested in Trust Deed notes	1,750.00	
Taxes	4,397.14	
Title expense	1,246.30	
Trustee's fees	4,364.38	
Discount	600.00	
Miscellaneous	1,368.95	
Assessments	5,564.07	
Special income tax service	600.00	
Improvements made	4,924.00	,
Amount paid to beneficiaries	100,000.00	
	<hr/>	184,469.26
Cash on hand Dec. 31, 1926		<hr/> \$ 8,940.35

RECORD OF LOT SALES:

Number of lots unsold Jan. 1, 1926	97½
Number of lots sold, 1926	34
	<hr/>
Number of lots unsold Dec. 31, 1926	63½

TRUST #123 B-N. S.

-7-

## SUMMARY OF RECEIPTS AND DISBURSEMENTS 1927 AS PER TRUSTEE'S RECORDS:

Cash on hand Jan. 1, 1927	\$ 8,940.35
---------------------------	-------------

RECEIPTS:

Collection on sales	\$123,944.50	
Interests	15,433.17	
Refund by So. Calif. Gas Co.	9,644.32	
	<hr/>	149,021.99
Total		<hr/> \$157,962.34

DISBURSEMENTS:

Commissions	\$ 18,596.76	
Interest	7.49	
Taxes	4,004.97	
Title expense	462.98	
Trustee fees	3,283.74	
City Bond Finance	5.00	
Miscellaneous expense	534.53	
Special tax and assessment service	567.00	
Assessments	173.55	
Amount paid to beneficiaries	95,000.00	
	<hr/>	122,636.02
Cash on hand Dec. 31, 1927		<hr/> \$ 35,326.32

RECORD OF LOT SALES:

Number of lots unsold Jan. 1, 1927	63½
Number of lots sold 1927	15
	<hr/>
	48½
Number of lots repossessed 1927	1
	<hr/>
Number of lots unsold Dec. 31, 1927	49½

TRUST #123 B-N. S. -8-

SUMMARY OF RECEIPTS AND DISBURSEMENTS 1928 AS PER TRUSTEE'S RECORDS:

Cash on hand Jan. 1, 1928 \$ 35,326.32

RECEIPTS:

Collection on sales	\$61,333.68	
Interest	10,145.12	
imp		
Interest on <del>un</del> founded funds	900.00	
	<hr/>	72,378.80
Total		<hr/>
		\$107,705.12

DISBURSEMENTS:

Repurchase of real estate loan	\$ 1,000.00
Interest on loan	56.97
Commissions	1,540.00
Taxes	4,673.26
Title expense	471.00
Trustee fees	1,756.45



Legal fee	10.75	
Light maintenance	310.06	
Miscellaneous expense	50.00	
Income tax service	2,520.00	
Discount	130.00	
Assessments	2.10	
Special assessment service	58.50	
Street bonds, principal and interest	3,895.00	
Weed cleaning	220.64	
Balance due on L. 363	33.61	
L. McGunn for equity in T. D.		
Lot 363	231.55	
Amount paid to beneficiaries	90,900.00	
	<hr/>	107,859.89
		<hr/>
Overdraft Dec. 31, 1928	\$	154.77

RECORD OF LOT SALES:

Number of lots unsold Jan. 1, 1928	49½
Number of lots sold 1928	3
	<hr/>
Number of lots unsold Dec. 31, 1928	46½
Number of lots repossessed 1930	1
	<hr/>
Number of lots unsold Dec. 31, 1930	47½

TRUST #123-B N. S.

## RECORD OF ASSIGNMENTS OF BENEFICIAL INTERESTS AS RECORDED ON TRANSFER RECORDS OF TRUSTEE.

-9-

[illegible]



TRUST #123-B N. S.

## RECORD OF ASSIGNMENTS OF BENEFICIAL INTERESTS AS RECORDED ON TRANSFER RECORDS OF TRUSTEE (CONTINUED)

-10-

		ORIGINAL		TRANSFERS TO 12/31/23						TRANSFERS 1924				TRANSFERS 1925				TRANSFER 1926				TRANSFER 1928				BENEFICIAL INT.	
		ISSUE OF																									
		BENEFICIAL																									
		INTERESTS	DATE	KEY	PUR.	NO. OF	DATE	KEY	OR SALE	INT.	DATE	KEY	OR SALE	NO. OF KEY	DATE	KEY	PUR.	OF	DATE	KEY	OR SALE	NO. OF	OWNED				
NAME OF BENEFICIARY :																							KEY 12/31/28				
21.	R. D. Stratton	0	9/5/22	20	+	20																	0				
			10/20/22	1	—	20									DATE	KEY	OR SALE	KEY									
22.	C. M. Staub	0	9/5/22	20	+	20																	20				
23.	Genevieve V. Lynch	0	10/10/22	3	+	60																	0				
			10/10/22	20	—	60																					
24.	A. R. McConigle	0	10/28/22	12	+	120																	60				
			11/3/22	20	—	60																					
26.	M. C. Marsh, Jr.	0	11/28/22	19	+	30																	30				
27.	Emma Van Loon	0					2/1/24	6	+	60													0				
							2/10/24	4	—	60																	
								2															0				
29.	H. H. Cotton Estate Co.						6/15/24	30	+	120													120				
30.	Victoria L. Catton	0	1/20/23	2	+	60	6/15/24	29	—	60													0				
31.	Fransisco & Ellington, Inc.		2/6/23	13	+	120					3/14/25	34	—	40									0				
											3/14/25	35	—	40													
											3/14/25	13	—	40													
34.	Herbert Fransisco	0									3/14/25	31	+	40					2/3/28	45	—	40	40				
																			7/24/28	45	+	40					
35.	William T. Ellington	0									3/14/25	31	+	40									40				
36.	Isabel K. Carrol	0									5/27/25	5	+	120									0				
											5/27/25	37	—	120													
37.	J. A. & Alice Le Daux										5/27/25	36	+	120									120				
39.	Neal Rasmussen	0									6/25/25	20	+	95	11/19/26	43	—	95					0				
43.	Lucy Causon Rasmussen	0													11/19/26	39	+	95					95				
45.	Seaboard Surety Corp.	0																	2/3/28	34	+	40	0				
																			7/24/28	34	—	40					
	Total	1800		11		630		5		285		6		455		1		95		2		80	1800				

	TRANSFERS	NO.	INTERESTS
INCEPTION TO 12/31/23		11	630
YEAR	1924	5	285
	1925	6	455
	1926	1	95
	1928	2	80
		—	—
Total		25	1545

EXPLANATION	
Key —	Refers to number of beneficiary
+	Interests purchased
—	Interests sold





EX K1

C. C. C. TATUM

Realtor

Suite 636 Merchants National Bank Building

Los Angeles, Cal. 4/28/22

Hellman Commercial Trust & Savings Bank,

Attention Mr. T. K. Hulme,

Los Angeles, California.

Gentlemen:

In connection with the purchase of 136.5346 acres on Wilshire Boulevard, being in the Rodeo Land and Water Company Syndicate, another syndicate being formed by C. C. C. Tatum, would say that they are purchasing the property for \$320,785.00, payable \$50,000.00 cash and \$50,000.00 or more per year, with interest at six per cent on deferred payments, payable semi-annually.

They are purchasing the property subject to all the conditions and restrictions contained in the contract between the Rodeo Land and Water Company and the Hellman Bank, and all the conditions, restrictions and reservations contained in the Declaration of Trust between the Rodeo Land and Water Company and the Hellman Commercial Trust and Savings Bank both as regards to reservations and regards to conditions of subdivision and requirements for street work bonds.

That a subdivision trust is to be created with your Bank and a schedule of release prices filed with map upon the execution of declaration by yourself.

Yours truly,

H. H. COTTON (Signed)

HHC:M

COPY

K 2

Los Angeles, Cal., 6/27/22

T. K. Hulme, Trust Officer,  
Hellman Commercial Trust & Savings Bank,  
Sixth and Main Streets,  
Los Angeles, California.

Dear Mr. Hulme:

Regarding Tract #4988 of which you are the Trustee, will say that we have decided to place the building restriction on all residence lots at \$3000.00, no limit as to height, and to set back 25 ft. from the property line; no temporary buildings allowed; all buildings to be built of new material; no buildings to be moved on the ground without written approval of the manager of the tract; business buildings to be fairly worth \$3000.00; property to be sold to or occupied only by the White or Caucasian race, except in the cases of servants; business buildings will be permitted on the Wilshire frontage, the Preuss Road frontage and on the new boulevard that is to run North or South at or near the Easterly side of the tract. Limit the time of restrictions until 1950.

The Ford-Fletcher Company is doing our printing and in as much as they have agreed to buy property from us in the tract, we wish you would give them the printing of all contracts and deeds necessary for this tract. I should think about 1500 contracts would be sufficient and about 750 deeds, as we have 685 lots.

Thanking you in advance, I am

Sincerely yours,

C. C. C. TATUM

C. C. C. TATUM

K 3

Realtor

Suite 636 Merchants National Bank Building

Los Angeles, Cal., 6-30-22.

Hellman Commercial Trust & Savings Bank,  
Attention T. K. Hume, Trust Officer,  
Los Angeles, California.

Gentlemen:

Herewith will be handed you bill for surveying etc. for the Wilshire Boulevard Syndicate, your Trust 123-B, to J. P. Lashbrooke for \$457.51 which you will kindly pay to Mr. Lashbrooke out of the funds on hand and charge to said Syndicate.

Thanking you very much, I am

Sincerely yours,

(Signed) C. C. C. Tatum.

CCCT:M

---

COPY

K 4

Los Angeles, November 17, 1922.

Hellman Commercial Trust & Savings Bank,  
Los Angeles, Cal.

Trust 123B N.S.

Gentlemen:

You have on hand in Escrow 9261 the sum of \$5000.00 from the proceeds of the sale to Pacific Ready Cut Homes, Inc. and as there is interest due the Sellers in said Trust of some \$8000.00, and you have on hand today some \$3000.00, that can be used for this purpose; I am hand-



ing you herewith my personal check for \$4974.00 which you will use to pay this interest immediately.

Also, you will kindly pay to me said \$5000.00 you now hold in escrow as this check is a loan less interest for one month at 6% and revenue stamp for \$1.00; in other words, I have used my own credit so as not to jeopardize the interest of my syndicate.

Very Truly yours,

C. C. C. TATUM

---

COPY

K 5

Los Angeles, California, November 24, 1922.

Hellman Commercial Trust & Savings Bank,  
City.

Trust 123B—N.S

Gentlemen:

Herewith I hand you a bill dated November 20th showing an indebtedness of \$2279.00 to Francisco and Ellington.

You are directed to transfer \$1200.00 from the agent's account to buyer's account and to issue your check payable to the Merchants National Bank for the account of Francisco and Ellington in the sum of \$2279.00.

Very truly yours,

R. M. HULTS.

COPY

K 6

Los Angeles, Cal. Jan. 10, 1923.

Hellman Commercial Trust & Savings Bank,  
6th & Main Sts.,  
Los Angeles, Calif.

Attention Mr. J. H. H. Scales, Trust Dept.

Gentlemen:

We wish to make a change in the restrictions on our  
Wilshire Boulevard Tract, known as Tract #4988.

On all lots on the North side of  
Wilshire Blvd.,  
Hamel Drive,  
Willaman Drive  
Stanley Drive  
LeDoux Rd.,

the restrictions will be single private residence, cost to  
be fairly worth for labor and material, not less than  
\$4500.00.

That restriction take in

Lots 61 to 97 inc.,  
194 " 144 "  
202 " 250 "  
257 " 309 "

Thanking you for many past favors, I am

Yours very truly,

R. M. HULTS  
WITH C. C. C. TATUM

RMH.H

K 7

Loans

Phones: Automatic 13303.

Insurance

Main 3303.

C. C. C. TATUM

Realtor

Suite 636 Merchants National Bank Building

Los Angeles, Cal., 2/19/23.

Hellman Commercial Trust & Savings Bank,

Attention Mr. J. H. H. Scales,

Los Angeles, California.

Gentlemen:—

In re: Trust 123-B N. S.

Please draw check payable to the Southern California Edison Company for \$5,882.00 for electric poles in Tract 4988 and charge same to the improvement account.

Yours truly,

CCC:M

(Signed) C. C. C. Tatum

K 8

February 23rd, 1923.

Southern California Edison Company,

Santa Monica, California.

Gentlemen:

Our Trust 123 B. N S

Attention: Mr. Neeland

Herewith enclosed, please find agreement mentioned in our letter to you of the 20th, which we failed to enclose.

In your letter of the 21st. you state that, if we prefer, you will draw agreement between this bank and your-

selves in lieu of the one between Mr. Tatum and your company. Though the title to this property is in the bank, we are acting under the direction of Mr. Tatum and the other beneficiaries under said trust, and for that reason would rather have said agreement drawn as is, in its present form.

Thanking you for your courtesy, in this matter, we are

Very truly yours,

Trust Department.

---

F

K 9

SOUTHERN CALIFORNIA EDISON COMPANY

Santa Monica, Calif.,

February 24, 1923.

Mr. J. H. H. Scales,  
Trust Department,  
Hellman Bank,  
Los Angeles, Calif.

Dear Sir:

Attached please find your receipt for your check made to the order of this company in the amount of \$5882.00, covering extending of our lines into the C. C. C. Tatum Tract, Beverly Hills.

Truly yours,

Southern California Edison Company,

(Signed) W. R. Neeland,

District Manager

W. R. N. E.



K 10

HELLMAN COMMERCIAL TRUST & SAVINGS  
BANK

Los Angeles.

March 5th, 1923.

Hellman Bank.

Kindly make check payable to Beverly Hills Annexation Association, for \$100.00, and charge same to Buyers' account.

C. C. C. TATUM.

---

K 11

BEVERLY HILLS ANNEXATION ASSOCIATION  
471 Beverly Drive, at Burton Way  
Beverly Hills, Cal.

March 7, 1923.

Trust Department,  
Hellman Bank,  
6th. & Main,  
Los Angeles, California.

Gentlemen:

I beg to acknowledge receipt of check in the sum of \$100 drawn in favor of the Beverly Hills Annexation Association, as per request of Mr. C. C. C. Tatum. This check was received by the Beverly Hills Realty Company and turned over to us by them.

Taking this opportunity of thanking you for your prompt attention, we beg to remain,

Yours truly,

BEVERLY HILLS ANNEXATION ASSOCIATION

By K. F. BIEHLER

KFB:D

K 12

TRUST DEPARTMENT  
HELLMAN COMMERCIAL TRUST AND  
SAVINGS BANK

Los Angeles,  
April 16, 1926.

Elliott Harne Company,  
614 South Spring St.,  
Los Angeles, Calif.

Gentlemen:

Herewith please find our check in the amount of \$3228.82, same covering assessment in Tract 4988, for the improvement of Realtor Road, etc.

Kindly send receipt to this Bank, care of the undersigned.

Very truly yours,  
(Signed) E. M. Evans,  
Tax Clerk

---

K 13

March 6th, 1923.

Beverly Hills Realty Co.,  
Cor. Burton & Santa Monica Blvd.,  
Beverly Hills, California.

Trust 123b NS

Gentlemen:

Herewith enclosed we hand you our check in favor of Beverly Hills Annexation Association, in the sum of \$100.00, the same to be used in connection with your

130      *Merchants Trust Company, Trustee, vs.*

work in attempting to have the City of Beverly Hills annexed by the County of Los Angeles.

This check is sent you at the request of Mr. C. C. C. Tatum.

Very truly yours,

Trust Department

---

F

COPY

K 14

Los Angeles, Cal.

March. 31, 1923.

Hellman Commercial Trust & Savings Bank,  
Los Angeles, California.

Attention: Mr. J. H. H. Scales.

Gentlemen:

On November 9th, I advanced to the Syndicate 123 B N.S. the sum of \$5000.00 so that our interest would not be in arrears to the Rodeo Land & Water Company and the Cotton Syndicate. I borrowed this money myself personally from *you* bank and I believe it is no more than fair that the syndicate should pay me the interest I have paid on this \$5000.00 from Nov. 9, 1922 to the date of the check I received (March 29th)—interest to be at the rate of 7%. I trust you will kindly make a check payable to me for this interest, and oblige.

Sincerely yours,

C. C. C. TATUM

CCCT:FLL

The interest, as we figure it, from Nov. 9, 1922 to March 29, 1923, (4 Monts, 20 Days) at 7% amounts to \$136.11.

C. C. C. T.

---

K 15

Loans	Phones: Automatic	13303
Insurance	Main	3303

C. C. C. TATUM      123-B N.S.

Realtor

Suite 636 Merchants National  
Bank Building

Los Angeles, Cal.,  
Apr. 9, 1923.

Hellman Comm'l. Trust & Savings Bank,  
Los Angeles, Calif.

Attention: Mr. T. K. Hume,  
Trust Officer.

Gentlemen:

Regarding the granting to the Southern California Edison Company right to erect poles and maintain same in our Tract 4988, as per the agreements and blue print hereto attached, will say it is perfectly satisfactory to me for you to sign said agreement, as this is the usual custom in matters of this kind.

Yours truly,

(Signed) C. C. C. Tatum.



COPY

K 16

Los Angeles, Calif.  
October 18, 1923.

Hellman Commercial Trust & Savings Bank,  
Attention Mr. E. E. Wright,  
Trust Department,  
Los Angeles, California.

Gentlemen:                      In re: Tract 4988

This is your authority to grant to the Southern California Edison Company a right of way in accordance with the attached easement and blue print.

Yours very truly,

C. C. C. TATUM

M

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COPY

K 17

Los Angeles, Cal.,  
Dec. 19, 1923.

Hellman Commercial Trust & Savings Bank,  
Los Angeles, California.

Gentlemen:                      Re: Trust 123B N.S.

You will please take from the Buyers Account of the above trust all available funds and apply on my two notes, first on the unpaid balance of a \$15,000 note, said unpaid balance is about \$3600.00 and then apply on note given this day for \$10,000.00 until same is fully paid.

Yours very truly,

C. C. C. TATUM

CCCT-GC

P. S.—These notes are my personal notes for the improvement a/c.

COPY

K 18

Los Angeles, Cal.,  
December 31, 1923.

Hellman Commercial Trust & Savings Bank,  
6th & Main Streets,  
Los Angeles, Calif.

Gentlemen:                      Re: Trust 123B N.S.

Out of the buyer's account of the above trust you will kindly pay half of the amounts received to Francisco & Ellington for account of street improvements and the other half kindly pay on my note dated Dec. 19th for \$10,000. This arrangement to continue from now until the first of February.

Mr. Bell has consented to this arrangement and presume you will want his OK to this memorandum.

Sincerely yours,

C. C. C. TATUM

C.C.C.T:GC.

K 19

Fransisco and Ellington, Inc.,  
Engineering Contracting  
132-G West Fifth Street  
Phone 557-918

Los Angeles, Calif.

February 27, 1924.

Hellman Commercial Trust & Savings Bank,  
6th & Main Streets,  
Los Angeles, Cal.

Gentlemen:

Re: Trust 123 B—N.S. Tatum Syndicate.

The under-signed does hereby make demand upon you as Trustee of the herein above referred to trust for the

sum of \$77,879.94, as per attached statement, same being the amount now due and immediately payable on account of construction work completed by the undersigned and done pursuant to a construction contract entered into by the undersigned and with Mr. C. C. C. Tatum, as Attorney-in-Fact for the equitable owners under said Trust.

Yours very truly,

Francisco and Ellington, Inc.

By (Signed) Van R. Kelsey

VRK:JK

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COPY

K 20

Los Angeles, Cal.

Feb. 27, 1924.

Hellman Commercial Trust & Savings Bank,  
6th & Main Sts.,  
Los Angeles, Calif.

Re: Trust 123B N.S.—Tatum Syndicate.

Gentlemen:

I am enclosing herewith letter and attached statement from Francisco & Ellington, Inc., all of which is self-explanatory.

You are hereby directed to notify the holders of the beneficial interest, such notice to be done by registered mail, of the amount for which they are respectively assessed, in order to pay \$75,000.00 on account of said demand. The assessment will be for 100% of the amount originally subscribed and paid in.

Yours very truly,

C. C. C. TATUM

CCCT:GC

COPY

K 21

Los Angeles, Cal.

March 7, 1924.

Hellman Commercial Trust & Savings Bank,  
Los Angeles, California.

Gentlemen:            Re: Trust 123B N.S.

You are authorized and directed to pay to Francisco  
& Ellington, Inc., all moneys received on account of as-  
sessments made in the above trust. Such payments to be  
made to them when and as received by you.

Yours very truly,

C. C. C. TATUM

CCCT:GC

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COPY

K 22

Los Angeles, Cal.

5/26/24

Hellman Commercial Trust & Savings Bank,  
Attention Trust Department,  
Los Angeles, California.

Gentlemen:            Attention Trust No. 123B N.S.

In consideration of extraordinary and additional services  
which the Trustee has rendered in connection with the  
above numbered trust, you are hereby authorized and  
directed to pay from the buyers account the sum of One  
thousand (\$1000.00) Dollars to the Hellman Commercial  
Trust and Savings Bank, as trustees fee in addition to  
those provided under the trust; this money to be paid



when the monies advanced by the buyers under the said trust have been repaid to them, namely assessments for the completion of street work and the completion of the payments on the purchase price of the property.

Yours very truly,

C. C. C. TATUM

CCCT:M

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COPY

K 23

Los Angeles, Cal.

May 16, 1924.

Hellman Commercial Trust & Savings Bank.

Trust 123C N.S.

On account of Mr. H. H. Cotton advancing money necessary to pay interest due May 9, please repay to him money advanced plus 5% bonus for advance out of 1st money available.

Yours, etc.

C. C. C. TATUM

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COPY

K 24

Los Angeles, Calif.

September 12, 1924.

Hellman Commercial Trust and Savings Bank,  
Los Angeles, California.

Gentlemen:

You will please pay to the Beneficiaries under the above mentioned trust that paid their assessment, known

as the first assessment, out of the funds of said trust and include in their payment seven per cent interest on the amount they paid from the date of their payment. This interest is to be paid when the assessment is fully returned.

Very truly yours,

C. C. C. TATUM

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C. C. C. TATUM

REALTOR

636 Merchants National Bank Building.

Los Angeles, Cal.,

October 1, 1924.

Hellman Commercial Trust & Savings Bank,  
Los Angeles, Calif.

In Re: TRUST #123 B & S, Tract 4988, known  
as C. C. C. Tatum's Wilshire Tract.

Gentlemen:

You will please pay to the order of Francisco & Ellington the sum of \$1666.66, together with interest thereon computed at the rate of 7% per anum from February 9, 1923. This is the amount they paid to me in lieu of you for what is known as the first assessment.

Thanking you for your courtesy, I am

Very truly yours,

C. C. C. TATUM

CCCT:CS

PAID 10/14/24.

K 25

COPY

Los Angeles, Calif.

10/23/24

Hellman Commercial Trust & Savings Bank,  
Sixth & Main Streets,  
Los Angeles, California.

Gentlemen:

Regarding Trust 123B N.S., would respectfully ask you to sign the attached petition for paving of LaCienega Boulevard as it is necessary to have the record owner's name appear hereon.

This will cover Lots 315-336 inclusive, 338-372 inclusive, 373, 589, 590-618 inclusive, Tract 4988.

Yours very truly,

C. C. C. TATUM

CCCT:M

K 26

Fransisco & Ellington, Inc.,  
Engineering    Contracting  
1250 West Fifth Street  
Phone 557-918

Los Angeles, Calif.

March 14th, 1925.

Hellman Commercial Trust & Savings Bank,  
Los Angeles, California.

Gentlemen:

We are handing you herewith certificate of Interest in and to your Trust No. 123-B—N. S. representing a ten

one hundred fiftieths (10/150ths) interest in said Trust with instructions for you to issue three certificates of interest in lieu of the one inclosed herewith, by which one *thid* ( $\frac{1}{3}$ ) of the value of the inclosed certificate will be issued in the name of William T. Ellington, individually, Herbert Fransisco, individually, and Van R. Kelsey, individually.

Any further funds or proceeds growing out of said Trust certificate shall be divided as hereinabove indicated, and subject to the call of the individuals above named.

Yours very truly,

Fransisco and Ellington, Incorporated,

By (Signed) W. T. Ellington, Pres.

(signed) Van R. Kelsey,

Sec'y. and Treas.

(SEAL)

VRK;K

Encl.

K 27

C. C. C. TATUM

REALTOR

636 Merchants National Bank Building

Los Angeles, California.

3/27/25

Hellman Commercial Trust & Savings Bank,

Attention Mr. J. H. Bowen,

Seventh & Spring Streets,

Los Angeles, California.

IN RE: Tract 4988, Trust 123B—NS.

Gentlemen:

Will you kindly make a Deed to the City of Beverly Hills covering the Easterly 20 feet of Lots 315-340 in-



140      *Merchants Trust Company, Trustee, vs.*

clusive; the Easterly 20 feet of Lot 343; the Westerly 20 feet of Lot 344; the Westerly 20 feet of Lots 347-373 inclusive; the Easterly 20 feet of Lots 604-618 inclusive; the Westerly 20 feet of Lots 589-603 inclusive, and oblige

Yours very truly,

C. C. C. TATUM

M.

M

---

K 28

C. C. C. TATUM

REALTOR

636 Merchants National Bank Building  
Los Angeles, Cal.

Mr. I. W. Hastings,  
c/o Hellman Commercial Trust & Savings Bank,  
Sixth & Main Streets,  
Los Angeles, California.

Dear Mr. Hastings:

Please be notified that you are to receive no further payments on contracts in Trust 123B-NS when said payments are delinquent, without first notifying our office.

Trusting you will notify your bookkeeping department to this effect; also your contract department, I am

Yours very truly,

C. C. C. TATUM

M

M

K 29

C. C. C. TATUM

Realtor

636 Merchants National Bank Building

Los Angeles, California.

1/15/26

Hellman Commercial Trust & Savings Bank,  
Attention Mr. J. H. Bowen,  
Seventh & Spring Streets,  
Los Angeles, California.

In re: Tract 4988.

Gentlemen:

This is your authority in connection with Trust 123B-NS, to accept my signature by Myrtle Abramson and Walter S. Jackson jointly, to any papers necessary for the sale of lots or anything else that comes up during my absence in connection with this Trust where it is necessary to have my signature.

Yours truly,

C. C. C. TATUM

CCCT:M

K 30

TRUST DEPARTMENT  
HELLMAN COMMERCIAL TRUST AND SAVINGS  
BANK

Los Angeles,  
April 16, 1926.

Elliot Harne Company,  
614 South Spring St.,  
Los Angeles, Calif.

Gentlemen:

Herewith please find our check in the amount of \$3228.82, same covering assessment in Tract 4988, for the improvement of Realtor Road, etc.

Kindly send receipt to this Bank, care of the undersigned.

Very truly yours,

(Signed) E. M. Evans,  
Tax Clerk

---

K 31

COPY

Los Angeles, California.  
November 24, 1926.

Merchants National Trust & Savings Bank,  
7th & Spring Sts.,  
Los Angeles, California.

Attention of J. H. Bowen,  
Re: Trust #123B N.S.

Gentlemen

You have in the assets of the above trust a note signed by Armand Robert being part of a second mortgage, dated either March 1923 or 1924 for \$5,000.00. As it is necessary to re-finance the property on which this \$5,000.00 mortgage is secured, and in doing so we find to put the property on a sound financial basis it will be necessary for this trust to take back a note for \$6,000.00, and I would kindly ask you to advance \$1,000.00 out of the funds of said trust, making check for this amount payable to the Title Insurance & Trust Company, who are trustees, and let me have the note you now hold, and I will secure for it a new note for \$6,000.00.

Yours very truly,

C. C. C. TATUM

CCCTLCAQ

C. C. C. TATUM

Realtor

936 Merchants National Bank Building  
548 South Spring Street  
Los Angeles, California

Sept. 10th, 1926.

Hellman C. T. & S. Bank,  
7th. & Springs Sts.,  
Los Angeles, California.

Gentlemen:            Attention: J. H. Bowen:

You will please pay to W. S. Jackson the sum of One thousand (\$1,000.00) Dollars for two years services rendered in connection of our water plant on Tract #4988 and charge same to Trust #123B-N.S.

Yours truly,

C. C. C. TATUM

---

K 33

C. C. C. TATUM

Realtor

636 Merchants National Bank Building  
548 South Spring Street,  
Los Angeles, California.

September 6, 1927.

C. R. Bell, Vice-President,  
Merchants National Trust & Savings Bank,  
Seventh and Spring Streets,  
Los Angeles, California.

Dear Charles:

Regarding Trust #123B-NS, being my Wilshire Boulevard Tract 4988 that Ham and I were talking to you



about this morning, regarding releasing some of the impounded money, and for your information would say that I have just looked over the unsold lots totalling fifty-one and I think they would retail for approximately \$600,000.00 at or about today's values—many of which we are not going to sell for some time as we think LaCienega Boulevard, where we have thirty-four unsold lots, should reach \$400.00 to \$500.00 per foot in a few years hence.

The cost of selling this property would be about \$150,000.00 for commissions, certificates, trustee's charges, and with the unpaid contracts, notes and cash I am inclined to believe we will have considerable over \$700,000.00 to distribute to the beneficiaries before we are through.

I trust you will grant the small favor we requested.  
Thanks!

Sincerely yours,

C. C. C. TATUM

CCCT:M

K 34

MERCHANTS NATIONAL TRUST & SAVINGS  
BANK

Date September 6, 1927

From Mr. H. H. Ashley  
Vice President

Office Trust Department.

To: Mr. W. N. Holmes,  
Assistant Comptroller

Office: Trust Department, 8th &amp; Spring.

Subject: Trust 123B—C. C. C. Tatum

Assessment of Income Tax on Association  
Basis.

Following your conference with Mr. Tatum yesterday, the following arrangement was made with Mr. C. R. Bell:

Of the cash amounts impounded, being the entire interest of the beneficiaries in the above trust, we will hold one-half and distribute one-half. We will keep watch at all times upon the amount of balances due upon lot contracts and notes representing unpaid portions of the purchase price of lots, so that there will be ample security in case it becomes necessary for the bank to loan the trust the difference between the amount impounded and the total demand of the Government, in order to meet the Income Tax Assessment.

This arrangement does not represent the general policy in regard to impounding money for probable income tax assessments, but will be confined to cases where the facts

justify it, and the beneficiaries have secured Mr. Bell's approval.

H. H. A.

HHA:BM

K 35

Los Angeles, California,  
September 19, 1929.

Bank of America of California,  
Seventh and Spring Streets,  
Los Angeles, California.

To J. R. Lashbrooke, DR.

---

For engineering services in connection with  
Tract 4988

\$75.00

Received payment.....  
(Signed) J. R. Lashbrooke

O. K. for payment.

Please charge Trust #123-B—N.S.

(Signed) C. C. C. Tatum.

Ex. L  
SCHEDULE OF CASH DISTRIBUTIONS  
TRUST 123B-N. S.

NAME	ADDRESS	1924	1925	1926	1927	1928	TOTAL
C. C. C. TATUM	636 MCHTS. NAT'L. BANK BLDG. L. A.	17777.80	64000.08	8888.90	16888.91	16160.00	123715.69
(H. H. COTTON ESTATE	11TH FLOOR MCHTS. NAT'L. BK. BLDG.						
(CO.	L. A.	6666.70	23999.76	6666.60	6333.28	6059.98	49726.32
R. M. HULTZ	6763 SUNSET BLVD. L. A.	7777.89	11083.59				18861.48
W. M. LENZ	220 MCHTS. NAT'L. BANK BLDG. L. A.	3333.30	19999.80	6666.60	6333.30	6060.00	42393.00
DR. J. A. LE DOUX	MARSH STRONG BLDG. L. A.	6666.70	24000.11	5333.36	6333.37	6060.01	48393.55
EMMA VAN LOAN							
c/o E. LENZ	220 MCHTS. NAT'L. BANK BLDG. L. A.	3333.30	3999.96				7333.26
FLORENCE F. GIBBONS	4701 W. 12TH ST. L. A.	3333.30	12000.24	3333.40	3166.70	3030.00	24863.64
E. J. GATES ESTATE	) PACIFIC SOUTHWEST TRUST &						
c/o JUDGE WM. RHODES		6666.70	24000.11	6666.70	6333.37	6060.01	49726.89
HERVEY	) SAVINGS BANK L. A.						
ARTHUR H. RUDE	PICO & FLOWER STS. L. A.	3333.30	11999.88	3333.30	3166.63	3029.99	24863.10
BYRON H. PATTISON	202 S. KINGSLEY DRIVE, L. A.	3333.30	11999.88	3333.30	3166.63	3029.99	24863.10
TOM S. INGERSOLL	c/o L. A. REALTY BRD. 621 S. FLOWER						
	L. A.	3333.30	11999.88	3333.30	3166.63	3029.99	24863.10
W. R. MC GONIGLE	1ST ST. WHARF, SAN PEDRO, CALIF.	3333.30	11999.88	3333.30	3166.67	3029.99	24863.14
FRANCISCO & ELLINGTON	1248 W. 5TH ST. L. A.	6666.62	5999.94				12666.56
W. H. CLURE	c/o L. A. ATHLETIC CLUB. L. A. CAL.	3333.30	11999.88	3333.30	3166.62	3029.98	24863.08
ALEXANDER & CLARA							
PATTIE	R. D. #1 BOX 207, SANTA MONICA, CAL.	6666.70	24000.12	6666.70	6333.37	6060.01	49726.90
JOS. ENGERT	1029 W. VERNON, LOS ANGELES, CAL.	3333.30	11999.88	3333.30	3166.67	3029.99	24863.14
ANDY H. WILLIAMS	640 S. BROADWAY, L. A.	6666.70	24000.11	6666.70	6333.34	6060.01	49726.86
W. F. KING	c/o L. A. ATHLETIC CLUB. L. A. CAL.	1666.70	6000.12	1666.70	1583.37	1515.01	12431.90
C. M. STOUB	636 MCHTS. NAT'L. BANK BLDG. L. A.	1111.10	3999.96	1111.10	1055.56	1009.96	8287.68
M. C. MARSH, JR.	TITLE INSURANCE BLDG. L. A.	1666.69	6000.12	1666.70	1583.33	1515.01	12431.85
H. H. COTTON	11TH FLOOR MCHTS. NAT'L BANK						
	BLDG. L. A.		9000.00	2500.00	2375.00	2272.50	16147.50
V. R. KELNEY	701 HIBERNIA BLDG. L. A.		5999.95	2222.20	2111.09	2019.98	12353.22
W. T. ELLINGTON	1250 W. 5TH ST. L. A.		5999.95	2222.20	2111.09	2019.99	12353.23
NEAL RASMUSSEN	532 N. ROSSMORE, L. A.		7916.85	5277.90	5013.98		18208.73
HERBERT FRANCISCO	1250 W. 5TH ST. L. A.		5999.95	2222.20	2111.09	2019.99	12353.23
OURSELVES NOTE DEPT.	TATUM NOTE			8888.90			8888.90
" " "	LE DOUX NOTE			1333.34			1333.34
TITLE INS. & TR. CO.	c/o LUCY CARSON RASMUSSEN					4797.61	4797.61

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100000.00 360000.00 100000.00 95000.00 90900.00 745900.00

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## WILSHIRE BLVD.—C. C. C. TATUM

SUBSCRIPTION AND BENEFICIAL ASSESSMENT

## TRUST 123B-N.S.

NAME	ORIGINAL SUBSCRIPTION	FIRST ASSMTS.	SECOND ASSMTS.	INTEREST ON 1ST-ASSMT.
C. C. C. TATUM	10000.00		13333.33	
H. H. COTTON	5000.00	1666.66	5001.00	114.13
STANLEY S. ANDERSON	2500.00			
W. M. LENZ	2500.00	833.33	2500.00	92.81
J. A. LE DOUX	5000.00	1666.00	5000.00	184.59
S. M. FOLSOM ASSIGNED TO E. VAN LOON	2500.00	833.33		89.29
J. W. MC DONNELL	2500.00			
E. J. GATES	5000.00	1666.65	5000.00	185.30
ARTHUR H. RUDE	2500.00	833.33	2500.00	84.37
BYRON M. PATTISON	2500.00	833.33	2500.00	78.87

TOM S. INGERSOLL	2500.00		2500.00	
A. J. FELKER	5000.00			
W. T. ELLINGTON	5000.00			
W. H. CLUNE	2500.00	833.33	2500.00	91.21
ALEXANDER POLLIE	5000.00	1666.66	4999.99	185.62
JOS. ENGERT	2500.00	833.33	2500.00	90.89
ANDY H. WILLIAMS	5000.00	1666.67	5000.00	185.94
E. T. KEISER	2500.00			
R. M. HULTZ	2500.00	833.33	5833.33	92.49
W. F. KING (50% ASSIGNED TO M. C. MARSH JR.)	2500.00	416.67	1250.00	46.30
M. C. MARSH JR.		416.66	1250.00	46.36
W. R. MC CONIGLE		833.33	2500.00	93.45
FRANCISCO & ELLINGTON		1666.66	5000.00	196.73
FLORENCE GIBBONS			2500.00	
C. M. STAUB			833.33	
E. VAN LOON			2500.01	
	75000.00	17499.27	75000.99	1858.35

ORDER APPROVING AND SETTLING BILL OF  
EXCEPTIONS

The foregoing Bill of Exceptions duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein, and said Bill of Exceptions may be used by the parties, Plaintiff or Defendant, upon any appeal taken by either party, Plaintiff or Defendant.

DATED: February 15th, 1932.

Geo. Cosgrave

United States District Judge.

[Endorsed]: At Law No. 3811-H In the District Court of the United States for the Southern District of California Central Division Merchants Trust Company, Trustee of Trust No. 123-B N. S., Plaintiff, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, Defendant. Engrossed Bill of Exceptions Filed Feb 15 1932 R. S. Zimmerman, Clerk By C. A. Simmons Deputy Clerk. Miller, Chevalier, Peeler & Wilson 819 Title Insurance Building, Los Angeles, California. Attorneys for Plaintiff.



IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA CENTRAL DIVISION

MERCHANTS TRUST COM- )	
PANY, Trustee of Trust No. )	
123-B N. S., )	
)	
Plaintiff, )	
vs. )	At Law No. 3811-H
)	
GALEN H. WELCH, Collector )	
of Internal Revenue for the )	
Sixth Collection District of )	
California, )	
)	
Defendant. )	

PETITION FOR APPEAL

To the Honorable Judge of the United States District  
Court, In and for the Southern District of Cali-  
fornia, Central Division.

The above-named Plaintiff, feeling aggrieved by the  
decree rendered and entered in the above-entitled cause on  
the 5th day of February, 1932, does hereby appeal from  
said decree to the Circuit Court of Appeals for the Ninth  
Circuit, for the reasons set forth in the assignment of  
errors filed herewith, and Plaintiff prays that this appeal  
be allowed and that citation be issued as provided by law,  
and that a transcript of the record, proceedings and  
documents upon which said decree was based, duly au-  
thenticated, be sent to the United States Circuit Court

of Appeals for the Ninth Circuit, under the rules of such Court in such cases made and provided.

And your Petitioner further prays that the proper order relating to the required security to be required of Plaintiff be made.

MILLER, CHEVALIER, PEELER & WILSON

By Melvin D. Wilson

GIBSON, DUNN & CRUTCHER

By H. F. Prince

Attorneys for Plaintiff.

[Endorsed]: At Law No. 3811-H. In the District Court of the United States for the Southern District of California, Central Division. Merchants Trust Company, Trustee of Trust No. 123-B, N. S. plaintiff, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, defendant. Petition for Appeal Received copy of within this 8th day of February, 1932, I. F. Parker, attorney for defendant. Filed Feb. 8, 1932 R. S. Zimmerman, Clerk by Thomas Madden, Deputy Clerk. Miller, Chevalier, Peeler & Wilson, 819 Title Insurance Building, Los Angeles, California, attorneys for plaintiff.

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA CENTRAL DIVISION

MERCHANTS TRUST COM- )	
PANY, Trustee of Trust No. )	
123-B N. S., )	
Plaintiff, )	
vs. )	At Law No. 3811-H
GALEN H. WELCH, Collector )	
of Internal Revenue for the )	
Sixth Collection District of )	
California, )	
Defendant. )	

ASSIGNMENT OF ERRORS

Now comes the Plaintiff in the above entitled cause, and files the following assignment of errors upon which Plaintiff will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 5th day of February, 1932.

1. The Court erred in rendering judgment for Defendant on the facts found.
2. The Court erred in finding that the trust was engaged in business:
3. The Court erred in finding that the trust carried on business in the form and manner ordinarily adopted by corporations.
4. The Court erred in rendering judgment for the Defendant as a matter of law.

5. The Court erred in holding that the Trust was an association taxable as a corporation within the meaning of Section 701(a)(2) of the Revenue Act of 1928.

WHEREFORE, the Appellant prays that said decree be reversed and that said United States District Court for the Southern District of California, Central Division, be ordered to enter a decree reversing the decision in said cause.

DATED: February 6, 1932

MILLER, CHEVALIER, PEELER & WILSON

By Melvin D. Wilson

GIBSON, DUNN & CRUTCHER

By H. F. Prince

Attorneys for Plaintiff and Appellant.

[Endorsed]: At Law No. 3811-H. In the District Court of the United States for the Southern District of California, Central Division. Merchants Trust Company, Trustee of Trust No. 123-B, N. S., plaintiff, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, defendant. Assignment of Errors. Received copy of within this 8th day of February, 1932. I. F. Parker, attorney for defendant. Filed Feb 8-1932 R. S. Zimmerman, Clerk By Thomas Madden Deputy Clerk Miller, Chevalier, Peeler & Wilson, 819 Title Insurance Building, Los Angeles, California attorneys for plaintiff.

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA    CENTRAL DIVISION

MERCHANTS TRUST COM- )	
PANY, Trustee of Trust No. )	
123-B N. S., )	
Plaintiff, )	
vs. )	At Law No. 3811-H
GALEN H. WELCH, Collector )	
of Internal Revenue for the )	
Sixth Collection District of )	
California, )	
Defendant. )	

ORDER ALLOWING APPEAL

Upon reading the Petition for Appeal of the Plaintiff and Appellant, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit, from the decree heretofore filed and entered herein, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal to be filed by Plaintiff be fixed at the sum of \$250.00 and the same act as a bond for cost on appeal.

DATED: February 8th, 1932.

Geo. Cosgrave

Judge

[Endorsed]: At Law No. 3811-H In the District Court of the United States for the Southern District of California, Central Division. Merchants Trust Company, Trustee of Trust No. 123-B, N. S. plaintiff, vs. Galen H.



Welch, Collector of Internal Revenue for the Sixth Collection District of California, defendant. Order Allowing Appeal. Received copy of within this 8th day of February, 1932. I. F. Parker, attorney for defendant. Filed Feb. 8. 1932 R. S. Zimmerman, Clerk by Thomas Madden, Deputy Clerk. Miller, Chevalier, Peeler & Wilson, 819 Title Insurance Building, Los Angeles, California, attorneys for plaintiff.

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PACIFIC INDEMNITY COMPANY

(cut)

Los Angeles	LEE A. PHILLIPS	San Francisco
Pacific Finance	President	150 Sansome Street
Building		

IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF CALI-  
FORNIA CENTRAL DIVISION

---

MERCHANTS TRUST CO. )  
Trustee of Trust #123 B. N. S. )

Plaintiff )

vs. )

AT LAW 3811-H

GALEN H. WELCH, Collector )  
of Internal Revenue for the )  
Sixth Collection District of )  
California )

COST BOND ON  
APPEAL

Defendant )

----- )

KNOW ALL MEN BY THESE PRESENTS, That  
PACIFIC INDEMNITY COMPANY, a corporation  
organized and existing under the laws of the State of

California, and duly licensed to transact business in the State of California, is held and firmly bound unto GALEN H. WELCH, Collector of Internal Revenue for the Sixth Collection District of California, in the Penal sum of TWO HUNDRED FIFTY & NO/100 (\$250.00) DOLLARS, to be paid to the said Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, his heirs and assigns, for which payment, well and truly to be made, the PACIFIC INDEMNITY COMPANY binds itself, its successors and assigns, firmly by these presents.

SEALED with corporate seal and dated this 5th day of February, 1932.

THE CONDITION of the above obligation is such that whereas the said Merchants Trust Co., Trustee of Trust #123 B. N. S., plaintiff in the above entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 21st day of December, 1931, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

NOW, THEREFORE, the condition of the above obligation is such that if Merchants Trust Co., Trustee of Trust #123 B. N. S., shall prosecute its said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

The premium charged for this bond is \$10.00 per annum.

PACIFIC INDEMNITY COMPANY

[Seal]

By W. C. Bening

Attorney-in-Fact.

State of California }  
County of Los Angeles } ss.

On this 5th day of February in the year one thousand nine-hundred and 32 before me, ATALA M. CARTER a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared W. C. BENING known to me to be the duly authorized Attorney-in-Fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said W. C. BENING acknowledged to me that he subscribed the name of PACIFIC INDEMNITY COMPANY thereto as principal and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal]

Atala M. Carter

Notary Public in and for LOS ANGELES COUNTY,  
State of California.

My Commission Expires May 28, 1934.

[Endorsed]: 3811 H. In the District Court of the United States, Southern District of California, Central Division. Merchants Trust Co. Trustee of Trust #123 B. N. S. vs. Galen H. Welch, Collector of Internal Revenue for the Sixth District of California. Pacific Indemnity Company, Los Angeles, Pacific Finance Bldg., San Francisco 150 Sansome Street [Cut] Lee A. Phillips, President. Filed Feb. 8, 1932. R. S. Zimmerman, Clerk, by Thomas Madden, Deputy Clerk

MERCHANTS TRUST COM- )  
 PANY, Trustee of Trust No. )  
 123-B N. S., )  
 Plaintiff, )  
 vs. ) At Law No. 3811-H  
 )  
 GALEN H. WELCH, Collector )  
 of Internal Revenue for the )  
 Sixth Collection District of )  
 California, )  
 Defendant. )

AMENDED PRAECIPE FOR TRANSCRIPT OF  
RECORD

TO the Clerk of the United States District Court, in and  
for the Southern District of California, Central  
Division:

Please issue a certified transcript of record in the above entitled case on appeal to the Circuit Court of Appeals for the Ninth Circuit, consisting of the following:

1. Bill of Complaint, omitting Exhibits "A", "B", "C", and "D", (which Exhibits have been included in the Engrossed Bill of Exceptions).
2. Answer to Bill of Complaint.
3. Stipulation Waiving Trial by Jury.
4. Special Findings as Allowed by Court.
5. Decision.
6. The Judgment.
7. Bill of Exceptions on Behalf of Plaintiff.
8. Petition for Appeal.
9. Assignment of Errors.

10. Order Allowing Appeal, and Order Fixing Cost Bond.

11. Cost Bond.

12. Citation on Appeal.

13. Amended Praecipe.

MILLER, CHEVALIER, PEELER & WILSON

By Melvin D. Wilson

Attorneys for Plaintiff.

Counsel for defendant does not desire to file a counter-praecipe.

Samuel W. McNabb

SAMUEL W. McNABB

United States Attorney

By Alva C. Baird

Assistant United States Attorney.

Attorneys for Defendant.

[Endorsed]: At Law No. 3811-H In the District Court of the United States for the Southern District of California Central Division Merchants Trust Company, Trustee of Trust No. 123-B N. S., Plaintiff, vs. Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, Defendant. Amended Praecipe for Transcript of Record Filed Feb. 17, 1932 R. S. Zimmerman Clerk By C. A. Simmons Deputy Clerk Miller, Chevalier, Peeler & Wilson 819 Title Insurance Building, Los Angeles, California.



IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA    CENTRAL DIVISION

MERCHANTS TRUST COM- )  
PANY, Trustee of Trust No. )  
123-B N. S., )

)  
)  
Plaintiff, )

)  
)  
vs. )  
)

GALEN H. WELCH, Collector )  
of Internal Revenue for the )  
Sixth Collection District of )  
California, )

)  
)  
Defendant. )

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 161 pages, numbered from 1 to 161, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint omitting Exhibits "A," "B," "C" and "D"; answer; stipulation waiving jury; special findings as allowed by the Court; decision; judgment; bill of exceptions; petition for appeal; assignment of error; order allowing appeal; cost bond and amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$                      and

that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,

Clerk of the District Court of the  
United States of America, in and  
for the Southern District of  
California.

By

Deputy.



IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

---

Merchants Trust Company, Trustee of  
Trust No. 123-B N. S.,

*Appellant,*

*vs.*

Galen H. Welch, Collector of Internal  
Revenue for the Sixth Collection  
District of California,

*Appellee.*

---

BRIEF ON BEHALF OF APPELLANT.

---

MILLER, CHEVALIER, PEELER & WILSON,  
By MELVIN D. WILSON,

Title Ins. Bldg., 433 S. Spring St., Los Angeles,

GIBSON, DUNN & CRUTCHER,  
By HENRY F. PRINCE,

634 South Spring St., Los Angeles, California,

*Attorneys for Appellant.*





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No. 6763.

IN THE

United States

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

---

Merchants Trust Company, Trustee of  
Trust No. 123-B N. S.,

*Appellant,*

*vs.*

Galen H. Welch, Collector of Internal  
Revenue for the Sixth Collection  
District of California,

*Appellee.*

## BRIEF ON BEHALF OF APPELLANT.

---

### STATEMENT OF THE CASE.

This is an appeal from a judgment, for defendant, of the United States District Court, in and for the Southern District of California, Central Division, Honorable George Cosgrave, judge, denying appellant a refund of 1928 income taxes in the amount of \$5,712.65 paid at corporate rates.

The Commissioner of Internal Revenue held that this trust, which is ordinarily known as a "real estate subdivision trust," was an "association" taxable as a corpo-

ration, and assessed a tax against the Trustee which paid it to the defendant under protest.

All questions have been disposed of either by the complaint and answer, or by stipulation, except the one stated below:

### THE QUESTION INVOLVED.

The sole issue involved is whether appellant was, during the taxable year 1928, an association taxable as a corporation under section 701(a) (2) of the Revenue Act of 1928. If it was not taxable as an association there was no tax due from it as an entity and the entire amount paid, together with interest, is refundable.

This results from the fact that the Commissioner of Internal Revenue collected this tax on the theory that the income realized by the Trustee herein involved was taxable as that of an association, whereas under the Revenue Act of 1928, no tax is imposed upon a joint adventure as an entity, nor upon a partnership as an entity, nor upon a trust the income of which is distributable to the beneficiaries or members. In those situations, the beneficiaries or members of the trust, partnership or joint adventure, as the case may be, include their share of the income of the association in their individual return (whether the income was actually distributed to them or not), and pay the tax thereon at the prevailing normal and surtax rates applicable to individuals. The individuals involved in this case have reported their dis-

tributive share of the income of appellant in their returns and paid the tax thereon.

A corporation (defined as including an association), on the other hand, pays a flat tax rate as an entity on its net income regardless of the amount. Its shareholders are treated as separate entities from the corporation and include, in their returns, only dividends actually paid to them in the year the dividends are paid, being liable on such dividends only for surtax rates with no normal tax.

The corporate tax rate, during 1928, was 12 per centum. Normal tax rates on individuals during 1928 were  $1\frac{1}{2}$ , 3, and 5 per centum, depending on the amount of the income, and an additional surtax at rates graduated from 1 to 20 per centum. To tax this enterprise as a corporation therefore imposes, ultimately, an additional burden on each beneficiary of the difference between his normal tax and 12 per centum, which difference will vary from  $10\frac{1}{2}$  to 7 per centum on his share of the income of the trust or joint venture.

Even if it should be held that this enterprise is not to be treated as a joint adventure, appellant contends that it would nevertheless be wrong to tax it as an association, because if it is not to be treated as a joint adventure, the income should be taxed as that of "property held in trust" under section 162(b) of the tax law. It is to be treated for tax purposes either as a joint adventure—which we believe to be the correct treatment—or as a trust.



## STATUTES INVOLVED.

The income of a joint adventure is treated as the direct income of the individual members and taxed under sections 11 and 12(a) of the Revenue Act of 1928, the taxing words of which are as follows:

“11. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following: \* \* \*”

“12(a). There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: \* \* \*”

A joint adventure is a partnership limited to a specific venture. Partnerships are not taxable under section 181 of the Revenue Act of 1928, which reads:

“Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.”

The income of a corporation is taxed to the corporation as an entity under section 13(a) of the Revenue Act of 1928, of which the taxing words are:

“There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax of 12 per centum of the amount of the net income in excess of the credits against net income provided in Section 26.”

Section 701(a)(2), of the same Act, provides as follows:

“The term ‘corporation’ includes associations, joint-stock companies, and insurance companies.”

The following provisions as to the taxation of the income of trusts are contained in section 162(b):

“The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that \* \* \* (b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, \* \* \* but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. \* \* \*”

The Civil Code of California, section 857, relative to the creation of trusts, in effect throughout 1928, provided as follows:

“Express trusts may be created for any of the following purposes:

“(5) To convey, partition, divide, distribute, or allot real property in accordance with the instrument creating the trust, subject to the limitations of the same title.”

### STATEMENT OF THE CASE.

In this case one C. C. C. Tatum had contracted to buy a number of lots, comprising 136½ acres, in a tract on which subdivision had begun. The property was held by the Hellman Commercial Trust & Savings Bank in a subdivision trust. Not desiring to assume the entire deal, Mr. Tatum transferred the purchase contract to the Merchants Trust Company and interested nineteen other persons to participate with him in paying for and reselling the lots. [R. 121.]

The Merchants Trust Company entered into a formal contract to purchase the land, on behalf of certain persons called “Buyers,” from the Hellman Commercial Trust &

Savings Bank. The Merchants Trust Company had no interest of its own in the contract, and merely held it for the persons involved in the adventure. [R. 52.]

The sole object of the enterprise was to complete the subdivision of the tract, make such improvements as were necessary to effect sales, and sell the lots at a profit. [R. 50 to 74.]

The entire plan of procedure was specifically set out in the Declaration of Trust. The sales agent was named; the sales terms and the prices were specified, and the manner in which the receipts were to be distributed was specifically set forth. The Declaration of Trust provided that the entire receipts from the sales of the lots should be distributed first to pay the interests who had contracted to sell the real estate to Tatum, and then, after the payment of expenses, the balance was to be distributed to the members of the adventure. The capital was, therefore, to be immediately returned and not reserved for additional purchases of land, or further adventures. [R. 50 to 70.]

The trust indenture provided a minimum sales price for each of the lots. [R. 55, 56 and 57.]

The trust indenture provided that after full payment of the purchase price had been made by the Buyers to the Seller, all restraints imposed on the Buyers shall be removed and the proceeds of the sale shall be applied as directed by the Buyers, subject to the Trustee's fees and advances. [R. 62.]

The trust indenture provided that the Trustee should follow the wishes of the majority in beneficial interest, and that each of the Buyers appointed C. C. C. Tatum as

his attorney in fact, subject to the termination of such authority as attorney in fact in a specified manner. [R. 63-64.]

C. C. C. Tatum was appointed by the trust indenture as manager and exclusive selling agent for a term of three years, and was to receive as compensation, a commission of 20 per centum on sales. [R. 68-69.]

The Buyers or beneficiaries agreed to pay for all costs of street work and other improvements [R. 58-59]; taxes and assessments [R. 59-60]; and other expenses. [R. 64.]

Corporate trustees have been used in real estate subdivision work in Los Angeles for over 25 years. The purpose of the trust was three-fold:

- (a) To secure to the seller of the land payment of any unpaid balance due.

- (b) To secure to the lot purchaser a merchantable title when the payments provided for by his contract had been made.

- (c) To secure to any person who loaned money for improvements, or otherwise, repayment of amounts so loaned. [R. 38 to 40.]

Individual subdivision without the use of a responsible trust company resulted in grave abuses in that the lot purchaser often lost his money in cases where blanket mortgages were foreclosed, because of the failure to provide for proper mortgage releases and the proper distribution of funds collected. [R. 38.]

The trust had no name, except the number given it by the Trustee upon its own records. It did not have its own office or place of business. It had no officers, stationery, seal, or by-laws. [R. 35-36.]

The beneficiaries never had a formal meeting at which they voted on any question pertaining to the business of the trust, or gave instructions to Mr. Tatum or the Trustee. [R. 35.]

The beneficiaries never changed their attorney in fact or the Trustee. [R. 35.]

The Trustee never acquired more than the original lots specified in the Declaration of Trust. [R. 35.]

In 1928, no improvements were made; no maps were recorded; and no streets were dedicated. [R. 36.]

During the year 1928, the activities of the trust were devoted substantially to the collection of the amounts due on sales made in prior years. Three lots only were sold in 1928. [R. 115-116.]

From the inception of the trust to December 31, 1928, and subsequent thereto, the books and records of the trust were kept on the basis of actual cash receipts and disbursements. [R. 33.]

During the years 1923, 1924, 1925, 1926 and 1927, the Trustee, on behalf of the trust, filed returns with the Collector of Internal Revenue for the Sixth Collection District of California, on Form 1041, as a trust, under the provisions of section 219 of the Revenue Acts of 1921, 1924 and 1926. [R. 33.]

For the years 1923 to 1927, inclusive, the trust was taxed as a trust by the Commissioner of Internal Revenue, under the provisions of section 704(b) of the Revenue Act of 1928. [R. 33.]

The minimum restrictions to be imposed on the Buyers of lots sold by this trust were fixed by the Seller of the



land, namely, Hellman Commercial Trust & Savings Bank. [R. 35.]

The Trustee required any and all instructions from Mr. Tatum to be given in writing. Mr. Tatum conferred with and received the approval of the Trustee before making expenditures for improvements, and conferred with and received the approval of Mr. Cotton (the beneficiary of the Hellman Commercial Trust & Savings Bank trust which sold the land to appellant), relative to increasing the minimum building restrictions imposed on the lot purchasers. [R. 36.]

Some of the beneficiaries, upon request, received information from the Trustee or the sales agent, relative to the development and sale of the trust property. [R. 36-37.]

Some of the beneficial certificates were sold, transferred and assigned. [R. 37.]

Ninety-two per centum of the lots were sold prior to 1928, during the time that the trust was taxed as a pure trust. [R. 108 to 116.] The capital of the trust had been returned to the beneficiaries before January 1, 1928. [R. 148-149.]

### **Errors Relied Upon.**

The appellant submits that the District Court erred in holding that the trust was an association within the meaning of section 701(a)(2) of the Revenue Act of 1928.

### **ARGUMENT.**

The "Buyers" were joint adventurers and the income of their joint adventure (Trust 123-B N. S.) was taxable directly to them in accordance with their distributive shares.

The difference between a joint adventure on the one hand, and a partnership or an association on the other

hand, is that the joint adventure is a combination of persons jointly interested in a specific or single undertaking, whereas a partnership or association is a combination of persons jointly interested in a permanent undertaking of a particular kind or character.

The law provides that partners shall be taxed only in **their** individual capacity, section 182 of the Revenue Act of 1928, while associations are taxed as entities at corporate rates. (Section 701(a)(2) of the Revenue Act of 1928.)

The Commissioner of Internal Revenue, the Board of Tax Appeals, and the courts, have uniformly held that a joint adventure, while not specifically mentioned as one of the classes of taxpayers in the acts, is in fact a partnership.

The Revenue Bill of 1932 recognizes the administrative and judicial rulings on this point and in section 1004(a)(3) defines a partnership as follows:

“The term ‘partnership’ includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term ‘partner’ includes a member in such a syndicate, group, pool, joint venture, or organization.”

The administrative practice, as recognized by the Revenue Bill of 1932 and the decisions of the various tribunals, shows that enterprises or combinations which constitute joint adventures for ordinary purposes, are also joint adventures for the purpose of the Revenue Act.

The same thing is true with respect to trusts. The Revenue Act provides a specific method for taxing income of trusts. (Section 162(b) of the Revenue Act of 1928.) Appellant is a pure trust in form and by the law of California. (See Civil Code 857.)

Both the common law and the Revenue Acts recognize associations. Under the common law and by many decisions of the taxing tribunals, appellant is not an association, but a trust or joint adventure.

The Commissioner of Internal Revenue, however, has not taxed appellant as a trust, which it plainly is, or as a joint adventure, which it is according to the common law decisions on joint real estate adventures limited to specified properties, but has taxed appellant under an entirely different section of the law which does not clearly apply.

The principle is fixed that if a reasonable doubt exists as to whether or not an object has been clearly pointed out as being a subject of taxation by a taxing statute, that it must be exempt; or, in other words, taxing statutes must be strictly construed in favor of the taxpayer and against the Government.

There is a great doubt as to whether a liquidating, self-executing, single venture trust or joint adventure, such as appellant, is so like a permanent, continuous, progressive corporation that it should be taxed as such.

The District Court held appellant to be an association taxable as a corporation under the authority of a decision of this Honorable Court in the case of *Trust No. 5833, Security-First National Bank of Los Angeles, Successor*

to *Security Trust & Savings Bank, Trustee v. Welch*, 54 Fed. (2d) 323.

This court, in that case, held a real estate subdivision trust to be an association taxable as a corporation. The trust in that case had a board of five (5) syndicate managers, however, who were given authority to manage the affairs of the trust.

A Petition for Writ of Certiorari to the Supreme Court of the United States has been filed in that case, and the matter is now pending in the Supreme Court. The petition has not, as yet, been acted upon.

In any event the decision in *Trust No. 5833 v. Welch* is not binding on appellant. In the case at bar there was an existing subdivision trust of which the Hellman Commercial Trust & Savings Bank was Trustee. Appellant was organized to take over and liquidate a portion of the property held in the Hellman trust. The purpose of Trust 123-B N. S., therefore, was to liquidate a portion of a subdivision trust, while the purpose of Trust No. 5833 was to create a subdivision trust.

In the case at bar there is nothing akin to a board of directors, such as the board of directors present in Trust No. 5833. Virtually, every step from the purchase of the lots, through the improvements, sale of the property, and the distribution of the proceeds, was specifically set out in Trust 123-B N. S. The restrictions as to the type of improvements to be put upon the property was a matter within the control of the Seller, the Hellman Commercial Trust & Savings Bank. The terms, the minimum sales prices of the lots, were fixed by the trust indenture. The commission to be paid the sales agent, the name of



the sales agent, the type of improvements, the exact method of distribution of proceeds were all specifically set forth in the trust indenture. The adventure was limited to the original lots, upon the sale of which the proceeds were required to be distributed. Any problems remaining, after all these specific provisions and instructions, were to be solved by the beneficiaries who appointed Mr. Tatum as their agent to exercise their restricted powers.

While a board of five (5) syndicate managers resembles a board of directors of a corporation, a single agent does not resemble a board of directors of a corporation, but resembles a partner or joint adventurer, or trustee, or agent of tenants in common, who acts for his associates.

Since the decision of this court in the case of *Trust No. 5833 v. Welch, supra*, the United States Circuit Court of Appeals for the Seventh Circuit decided the case of *Russell Tyson, et al., Trustees of the Zenith Real Estate Trust v. Commissioner*, 54 Fed. (2d) 29. In that case the court held that the trust was taxable as a trust and not as an association where several trustees held a parcel of real property which was subject to a long term lease. The property was sold to a tenant in the taxable year involved.

This court, in its decision in *Trust No. 5833 v. Welch, supra*, referred to the Board of Tax Appeals' decision in the case of *Sloan v. Commissioner*, 24 B. T. A. 61. In that case an appeal to this court has been filed, No. 6808.

The entire question, therefore, of real estate subdivision trusts is still open and appellant submits that



it is a joint adventure, the income of which is taxable but once to its members, and not a separate entity, the income of which is taxed twice: Once to the association as an entity, and again to the beneficiaries on the dividends.

This court has so recently decided several cases involving this subject that it seems unnecessary for appellant to make extended argument, or cite the many cases in its favor, with all of which the court is familiar.

### CONCLUSION.

It is therefore respectfully submitted that the decision of the District Court should be reversed.

Dated: April 14, 1932.

MILLER, CHEVALIER, PEELER & WILSON,  
By MELVIN D. WILSON,

GIBSON, DUNN & CRUTCHER,  
By HENRY F. PRINCE,

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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Merchants Trust Company, Trustee  
of Trust No. 123-B N. S.,

*Appellant,*

*vs.*

Galen H. Welch, Collector of Internal  
Revenue for the Sixth Collection  
District of California,

*Appellee.*

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BRIEF ON BEHALF OF APPELLEE.

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**FILED**

**MAY 28 1932**

**PAUL P. O'BRIEN,**  
**CLERK**



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No. 6763.

IN THE

United States

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

---

Merchants Trust Company, Trustee  
of Trust No. 123-B N. S.,

*Appellant,*

*vs.*

Galen H. Welch, Collector of Internal  
Revenue for the Sixth Collection  
District of California,

*Appellee.*

## BRIEF ON BEHALF OF APPELLEE.

Pursuant to demand made upon it by the Commissioner of Internal Revenue through his duly authorized representatives appellant paid a tax for the calendar year 1928, at the prevailing corporate rate, in the amount of \$5,712.65.

### Issue.

Section 701 (a) (2) of the Revenue Act of 1928 provides:

“The term ‘corporation’ includes association, joint-stock companies, and insurance companies.”

The question is whether under the facts pertaining to the instant case the appellant comes within the purview of the foregoing section. The Government contends it is a business enterprise and, as such, falls within the category of an association, and is taxable at corporate rates. The appellant denies that it is an association and maintains that it is not subject to the tax imposed upon it.

### Preliminary Statement.

Trust No. 123-B N. S., of which the Merchants Trust Company of Los Angeles is the trustee, is a typical California real estate subdivision syndicate. This court has heretofore decided that such an enterprise is an association within the meaning of the Revenue Laws of the United States and, as such, is taxable as a corporation. (Trust No. 5833, *Security-First National Bank of Los Angeles*, successor to Security Trust & Savings Bank, Trustee, *v. Welch*, 54 Fed. (2d) 323.) The latter decision was rendered during the time the instant case was pending in the District Court for the Southern District of California. In the court below the following decision was rendered:

“Judgment is ordered for defendant on authority of *Security First National Bank of Los Angeles v. Galen H. Welch*, No. 6582, decided by the U. S. Circuit Court of Appeals, Ninth Circuit, December 7, 1931.

Defendant will prepare and present findings.

Dated this 21st day of December, 1931.

GEO. COSGRAVE,  
*U. S. District Judge.*

Filed Dec. 21, 1931.”

## Statute and Regulations.

Section 13(a) of the Revenue Act of 1928 provides as follows:

“(a) Rate of Tax.—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax of 12 per centum of the amount of the net income in excess of the credits against net income provided in section 26.” (Chap. 852, 45 Stat. 797; 26 U. S. C. A. 2013(a).)

As indicated above, Section 701(a)(2) provides:

“The term ‘corporation’ includes associations, joint-stock companies, and insurance companies.” (Chap. 852, 45 Stat. 878; 26 U. S. C. A. 2700(a)(2).)

As in all prior acts, the Revenue Act of 1928 provides:

“Sec. 62. The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.” (Chap. 852, 45 Stat. 810; 26 U. S. C. A. 2062.)

In passing, it may be said, it has been repeatedly held by the courts that regulations of the Commissioner of Internal Revenue, in so far as not inconsistent with express statutory provisions, have the force and effect of law.

*Maryland Casualty Company v. United States*, 40 S. Ct. 155, 251 U. S. 342, p. 349; 3 A. F. T. R. 3010.

Pursuant to the authority vested in him by Section 62, *supra*, and with the approval of the Secretary of the Treasury, the Commissioner has promulgated Regulations 74, relating to income tax under the Revenue Act of 1928.

The articles pertinent to the statutes here involved are as follows:

“Art. 1311. Person.—The Act recognizes four classes of persons—individuals, trusts and estates, partnerships, and corporations. Corporations include associations, joint-stock companies, and insurance companies, but not partnerships properly so called. A taxpayer is any person subject to a tax imposed by the Act.”

“Art. 1312. Association.—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to state laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of Section 701.”

“Art. 1314. Association Distinguished from Trust.—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the



trust and the beneficiaries thereof will be subject to tax as provided by Sections 161-170 and by Articles 861-891. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of Section 701. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act."

### **Statement of Facts.**

This case was submitted to the District Court on a written stipulation of facts together with a stipulation relative to rather voluminous documentary evidence which was made a part of the record pursuant to agreement of the parties. The sole error upon which the appellant relies here is that the "District Court erred in holding that the trust was an association within the meaning of Section 701(a)(2) of the Revenue Act of 1928".

The court adopted the facts stipulated and particularly those enumerated below, as its special findings of fact. (Findings relative to jurisdictional matters are omitted.)

#### **"I.**

H. H. Cotton, who had been engaged in the real estate business in and around the city of Los Angeles, California, for a great many years, entered into a contract with the Rodeo Land and Water Company to purchase a tract of land comprising approximately 190 acres, for the sum of \$242,314.00.



The purchase contract was transferred to the Hellman Commercial Trust & Savings Bank as trustee, and the trust was designated 123.

## II.

One C. C. C. Tatum desired to purchase a portion of the land involved in Trust 123 for the purpose of subdivision and sale, and interested nineteen other persons, including H. H. Cotton, and caused the Merchants Trust Company to enter into a contract to purchase approximately  $136\frac{1}{2}$  acres of the land from the Hellman Commercial Trust & Savings Bank for the sum of \$320,785.00. H. H. Cotton, as the principal beneficiary of Trust 123, approved the contract for the seller, and C. C. C. Tatum approved the contract for the buyer. The Merchants Trust Company held the purchase contract as trustee for the 20 persons interested in the enterprise. The trust was designated as Trust No. 123-B N. S. The last-named trust, a copy of which was attached to and made a part of plaintiff's complaint, was executed on the 1st day of July, 1922. The tract of  $136\frac{1}{2}$  acres acquired by the Merchants Trust Company, as trustee, acting for the syndicate of 20 persons, referred to above, was located within what is now the present corporate limits of the city of Beverly Hills, California. The motivating purpose of this trust was to subdivide into city lots, improve and sell the tract, above referred to, to the profit of the beneficiaries interested therein.

## III.

Both H. H. Cotton and C. C. C. Tatum were substantially interested in the trust as beneficiaries. The latter individual became exclusive sales agent for the trust, and was authorized to and did promote the enterprise of improving, subdividing and selling the property.

IV.

The amount to be paid for the one hundred thirty-six and one-half acres involved was \$320,785.00, payable in five (5) yearly installments, the first of which became due in May, 1923. All of the installments were for the sum of \$50,000.00 each, except the last and final payment, which became due on May 9, 1927, which was for the sum of \$70,785.00. All of the deferred payments bore interest from May 9, 1922, at the rate of six per cent (6%) payable semi-annually.

V.

There were associated with Mr. Tatum and Mr. Cotton in this enterprise, eighteen (18) other beneficiaries, each owning beneficial interests of from five to ten one hundred fiftieths (5 to 10/150ths).

VII.

That the Commissioner of Internal Revenue ruled that the plaintiff herein was transacting business in the form and manner ordinarily adopted by corporations, and that it constituted, during the year 1928, an association, and was taxable for said period as a corporation, and directed the trustee to file, on behalf of said trust, a return for the calendar year 1928, on Form #1120, the income tax return employed by corporations, and to pay tax on any income shown thereon at the rate of 12 per centum.

XII.

That the map indicating the lots and specifying the streets was recorded June 26, 1922. Such map was prepared in March, 1922, but the surveying of the land and the preparation of the map was paid for by this trust after its execution.

XIII.

That the minimum restrictions to be imposed upon the buyers of lots sold by this trust were fixed by

the seller of the land to this trust, namely, Hellman Commercial Trust and Savings Bank and Minna A. Newman, who was acting for H. H. Cotton.

XIV.

The beneficiaries of Trust 123-B N. S. never had a formal meeting at which they voted on any question pertaining to the business of the trust, or gave instructions to Mr. Tatum or the trustee. Mr. Tatum has remained the attorney-in-fact, and the sales agent since the inception of the trust and has superintended the development of the property and the sale of the lots during that period.

XV.

The trust never acquired more than the original lots specified and set forth in the declaration of trust.

XVI.

The trust had no specific name other than Trust 123-B N. S., given to it by the trustee on its records. It had no by-laws, seal, stationery, officers, other than the attorney-in-fact and the sales agent, and it did not have any place of business except that the trustee had its own place of business.

XVII.

In 1928 no improvements were made, no maps recorded, and no streets dedicated.

XVIII.

The trustee required any and all instructions from Mr. C. C. C. Tatum to be given in writing. Mr. Tatum conferred with, and received the approval of the trustee before making expenditures for improvement, and conferred with, and received the approval of Mr. H. H. Cotton, relative to increasing the minimum building restrictions imposed on lot purchasers.

XIX.

That the total acreage in the lots involved in Trust No. 123-B N. S. was one hundred thirty-six and one-half ( $136\frac{1}{2}$ ) acres within the county of Los Angeles, California, all of said land now being included within the corporate limits of the city of Beverly Hills; that said lots were acquired by Trust No. 123-B N. S. for the purpose of improvement and sale of the lots in the subdivision.

XX.

Units of beneficial interests were sold to the other beneficiaries for the purpose of raising additional capital to facilitate the development, improvement and sale of the tract; all of said beneficiaries purchased said units of beneficial interests for the purpose of making a profit. The beneficiaries received certificates of beneficial interests in the form set forth in Exhibit H. The beneficiaries were entitled to and did receive, upon request, information from the trustee or the sales agent relative to the development and sale of the lots comprising the tract of land held by the trust.

XXI.

That some of said beneficial interests were sold, transferred and assigned by the holders thereof, or pledged as collateral security for the payment of money or the performance of other obligations.

XXII.

That the necessary improvement and development made on said tract by said trust consisted mainly of grading, rolling and oiling streets, constructing curbs and sidewalks, and installing a water system (including the drilling of wells) for use in the development of the tract and for the domestic use of the lot purchasers.



XXIII.

That a sales office was maintained on said tract by the sales agent, the property advertised for sale, and a force of sales agents engaged who operated under the direction of C. C. C. Tatum; that during the year 1928 the sales force was reduced to that of a tract manager, but that a continuous effort has been made from the inception of the trust, to date, to dispose of the remaining lots in the tract.

XXIV.

The evidence submitted discloses that this syndicate, known as Trust No. 123-B N. S., was, during the taxable year 1928, engaged in business. At the inception of the trust there were six hundred eighty-five lots sold. Three of these were sold in 1928, and the trust had on hand for the purpose of sale forty-six and one-half ( $46\frac{1}{2}$ ) lots at the close of the last-named year. *The management, control and sale of the lots was vested in the beneficiaries, and the Merchants Trust Company, as trustee, was authorized to act upon the order of the beneficiaries holding a majority of beneficial interests. The beneficiaries appointed C. C. C. Tatum 'as their and each of their attorney-in-fact to represent them in all matters affecting said buyers in connection with this trust, \* \* \*.'* However, the trustee was authorized to act upon the exclusive order of Tatum, subject, however, to the right of the majority of holders of certificates of beneficial interests to remove Tatum as attorney-in-fact. In addition to the initial investment by the holders of certificates of beneficial interests, two assessments were made for the purpose of defraying outstanding obligations, amounting to the sums of \$17,499.27 and \$75,000.99, respectively. For the purpose of making these assessments assessment notices were sent to the certificate holders. A



copy of the form of notice used for this purpose was introduced in evidence as Exhibit 'I'. A distribution of the proceeds to the holders of certificates of beneficial interests, up to and including December 31, 1928, totaled \$745,900.00." (Italics ours.)

### Argument.

The question of what is an association within the meaning of the Internal Revenue Laws is one that has been before this court on several different occasions. The District Court's decision in this case is based squarely on the proposition that this court's decision in Trust No. 5833, *supra*, is controlling.

In its decision in Trust No. 5833 this court pointed out:

"There are two criteria for determining whether or not an organization or combination of individuals is taxable as an association. The first test found in Article 1312 is the business test, that is to say, the test as to whether or not the organization formed 'to do business in an organized capacity' and for the distribution of profits among shareholders in proportion to the investment or shares. The second test, contained in Article 1314, is for the purpose of distinguishing an association from a trust, and depends upon the question of whether or not 'the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees, or otherwise'."

It has been held that an enterprise may be an association within the meaning of the Revenue Acts, even though there is no element of control in the beneficiaries. Two of the outstanding cases involving the association question which have been before the United States Board of Tax Appeals are the cases of *Durfee Mineral Company*, 7 B.

T. A. 231, and *E. O. Landreth Company*, 11 B. T. A. 1, 20. In the former the element of control was present. In the latter the beneficiaries had no control. Both were held to be associations. However, in the instant case, as in that of Trust No. 5833, the beneficiaries have control over the trust and it is an enterprise formed "to do business in an organized capacity". All elements necessary to comply with the so-called "control test" and the "business enterprise test" are found in Trust No. 123-B N. S.

It is clear that under the terms of the declaration of trust and from the facts found by the court that Trust No. 123-B N. S. was organized for the purpose of purchasing, subdividing, improving and selling a large tract of land and that it was engaged in business for profit. In this connection, the court's attention is called to paragraphs II and XX of the court's findings of fact. Among other things, the court found:

"The motivating purpose of this trust was to subdivide into city lots, improve and sell the lots, above referred to, to the profit of the beneficiaries interested therein. \* \* \* Units of beneficial interest were sold to the other beneficiaries for the purpose of raising additional capital to facilitate the development, improvement and sale of the tract; all of said beneficiaries purchased such units of beneficial interest for the purpose of making a profit. The beneficiaries received certificates of beneficial interest in the form set forth in Exhibit H." [Tr. 105.]

The court also found that not only during the year 1928 but from the inception of the trust to date a continuous effort has been made to dispose of the remaining lots of the tract. Paragraph XXIV of the findings of fact [Tr. 25] reads, in part, as follows:

“The evidence submitted discloses that this syndicate, known as Trust No. 123-B N. S., was, during the taxable year 1928, engaged in business.”

In Trust No. 5833 the beneficiaries were represented by and exercised control of the trust through a board of syndicate managers, who were subject to removal at their discretion. Precisely the same mode of operation was followed in the instant case. The beneficiaries here, however, chose Mr. C. C. C. Tatum as an attorney-in-fact to represent them in all matters pertaining to the trust. Tatum was subject to removal by a majority of the holders of certificates of beneficial interest. In this connection the court found:

“The management, control and sale of the lots was vested in the beneficiaries. The Merchants Trust Company, as trustee, was authorized to act upon the order of the beneficiaries holding a majority of the beneficial interests. The beneficiaries appointed C. C. C. Tatum ‘as their and each of their attorney-in-fact to represent them in all matters affecting said buyers in connection with this trust, \* \* \*.’ However, the trustee was authorized to act upon the exclusive order of Tatum, subject, however, to the right of the majority of holders of certificates of beneficial interests to remove Tatum as attorney-in-fact.”

No extended discussion of either the facts, the law or the decided cases will be materially helpful to the court. It is deemed sufficient to call to the court’s attention that there is no material difference between this case and that of Trust No. 5833. Both cases involve typical Southern California real estate subdivision trusts. In each instance a syndicate was organized and a large tract of land was acquired for the purpose of improvement, subdivision and sale.

Mr. H. H. Cotton, one of the promoters and principal beneficiaries in Trust No. 123-B N. S., was likewise the promoter and one of the principal beneficiaries in Trust No. 5833. They were both organized for the purpose of acquiring, improving, subdividing and selling a large tract of valuable residential property. In each case capital was raised by selling units of beneficial interest to such individuals as cared to invest in the enterprise; a trust company was designated as trustee; the beneficiaries were represented in the affairs of the trust either through a board of managers or an attorney-in-fact. The instant suit was instituted prior to the time this court had rendered its decision in Trust No. 5833 and the position that counsel for the appellant is now compelled to take, namely, that there is a distinction between this case and the one heretofore decided, is, in view of the similarity of purpose and mode of operation between the two syndicates, untenable.

It is respectfully submitted that the judgment of the District Court should be sustained.

SAMUEL W. McNABB,  
*United States Attorney;*

IGNATIUS F. PARKER,  
*Assistant United States Attorney;*

ALVA C. BAIRD,  
*Assistant United States Attorney.*

Of counsel:

C. M. CHAREST,  
*General Counsel,*  
*Bureau of Internal Revenue;*

EUGENE HARPOLE,  
*Special Attorney,*  
*Bureau of Internal Revenue.*



United States  
Circuit Court of Appeals

For the Ninth Circuit. 3

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
SOUTHERN PACIFIC COMPANY,  
a Corporation,  
Appellee.

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Transcript of Record

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Upon Appeal from the United States District Court  
for the Northern District of California,  
Southern Division.

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FILED

MAR 30 1932

PAUL P. O'BRIEN,  
CLERK





United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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No. 18910-L

UNITED STATES OF AMERICA,

Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant and Appellee.

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NAMES AND ADDRESSES OF ATTORNEYS.

GEO. J. HATFIELD, U. S. Attorney,

LUCAS E. KILKENNY, Assistant U. S. Attorney,

Post Office Bldg.,

San Francisco, Calif.,

Attorneys for Plaintiff and Appellant.

HENLEY C. BOOTH, Esq.,

A. G. GOODRICH, Esq.,

65 Market St.,

San Francisco, Calif.,

Attorneys for Defendant and Appellee.

---

In the District Court of the United States for the  
Northern District of California.

Division.

No. 18910-L

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

SOUTHERN PACIFIC COMPANY,

Defendant.

## COMPLAINT FOR VIOL. SAFETY APPLIANCE ACT.

Now comes the United States of America, by Geo. J. Hatfield, United States Attorney for the Northern District of California and brings this action on behalf of the United States against the Southern Pacific Company, a corporation organized and doing business under the laws of the State of Kentucky, and having an office and place of business at San Francisco in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [1\*]

### FOR A FIRST CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the

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\*Page-number appearing at the foot of page of original certified Transcript of Record.

Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

defendant, on November 10, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of ten cars, drawn by locomotive engine No. 1198, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Mission Bay yard to Sixth street yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent

of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [2]

#### FOR A SECOND CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated



by the engineer of the locomotives drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated,

defendant, on November 11, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 26 cars, drawn by locomotive engine No. 1159, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Sixth street yard to Mission Bay yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [3]

#### FOR A THIRD CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier



engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated,

defendant, on November 12, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 20 cars, drawn by locomotive engine No. 1198, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Sixth street yard to Mission Bay yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [4]

#### FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910,

which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated,

defendant, on November 13, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 8 cars, drawn by locomotive engine No. 1202, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Mission Bay yard to Berry street, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [5]

### FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, and as modified by an order of the Interstate Commerce Commission of June 6, 1910, which order was made in pursuance of the provisions and requirements of the aforesaid amendment of March 2, 1903, to wit:

IT IS ORDERED: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together



with the 85 per cent shall have their brakes so used and operated,

defendant, on November 13, 1930, operated on its line of railroad over a part of a highway of interstate commerce, one train, to wit: Its own transfer consisting of 13 cars, drawn by locomotive engine No. 1198, said train being one operated with power or train brakes.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Sixth street yard to Mission Bay yard, at San Francisco, in the State of California, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

Plaintiff further alleges that by reason of the said violation of the said Act of Congress defendant is liable to the plaintiff in the sum of one hundred dollars. [6]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of Five Hundred dollars and its costs herein expended.

GEO. J. HATFIELD,

United States Attorney.

[Endorsed]: Filed Feb. 7, 1931. [7]



(Title of Court and Cause.)

The President of the United States of America  
To SOUTHERN PACIFIC COMPANY, De-  
fendant.

YOU ARE HEREBY DIRECTED TO AP-  
PEAR AND ANSWER the Complaint in an action  
entitled as above, brought against you in the Dis-  
trict Court of the United States, in and for the  
Northern District of California, Southern Division,  
within ten days after the service on you of this  
Summons, if served within this county, or within  
thirty days if served elsewhere.

And you are hereby notified that unless you ap-  
pear and answer as above required the said Plain-  
tiff will take judgment for any money or damages  
demanded in the Complaint, as arising upon con-  
tract or it will apply to the Court for any other re-  
lief demanded in the Complaint.

WITNESS the Honorable Harold Louderback,  
Judge of said District Court, this 7th day of Febru-  
ary in the year of our Lord one thousand nine  
hundred and thirty-one and of our independence  
the one hundred and fifty-fifth.

(Seal)

WALTER B. MALING,

Clerk.

By Lyle S. Morris,

Deputy Clerk.

[Endorsed]: Filed Feb. 10, 1931. [8]

(Title of Court and Cause.)

ANSWER OF DEFENDANT.

Comes now the defendant above named and for answer to plaintiff's complaint filed herein, admits, denies and alleges as follows, to wit:

FIRST CAUSE OF ACTION.

I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office, and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the [9] defendant on November 10, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of ten or any number of cars drawn by Locomotive Engine No. 1198, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce.

III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over

its or any line of railroad from Mission Bay Yard to Sixth Street Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

#### IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars (\$100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said first cause of action, defendant alleges:

#### I.

That on November 10, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1198 from Mission Bay Yard to Sixth Street Yard at San Francisco [10] in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely

for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

## SECOND CAUSE OF ACTION.

### I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

### II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the defendant on November 11, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of twenty-six or [11] any number of cars drawn by Locomotive engine No. 1159, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce.



### III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Sixth Street Yard to Mission Bay Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

### IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred (\$100) Dollars or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said second cause of action, defendant alleges:

### I.

That on November 11, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1159 from Sixth Street Yard to Mission Bay Yard at San Francisco [12] in the State of California; that the said movement was solely a switching movement between yards less than 3000



feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

### THIRD CAUSE OF ACTION.

#### I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

#### II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the defendant on November 12, 1930, operated on its lines of railroad one [13] train, to wit: its own transfer consisting of twenty or

any number of cars drawn by Locomotive engine No. 1198, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce.

### III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Sixth Street Yard to Mission Bay Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

### IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars (\$100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said third cause of action, defendant alleges:

### I.

That on November 12, 1930, it hauled on its line of railroad certain cars drawn by Locomotive En-

gine No. 1198 [14] from Sixth Street Yard to Mission Bay Yard at San Francisco in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

#### FOURTH CAUSE OF ACTION.

##### I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

##### II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the plaintiff's complaint or in violation of the order

of the Interstate Commerce Commission referred to in said complaint, the defendant on November 13, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of eight or any number of cars drawn by Locomotive Engine No. 1202, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce. [15]

### III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Mission Bay Yard to Berry Street at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

### IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars (\$100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said fourth cause of action, defendant alleges:



## I.

That on November 13, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1202 from Mission Bay Yard to Berry Street at San Francisco in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely for the [16] purpose of picking upon and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used or operated by the engineer of said locomotive engine.

## FIFTH CAUSE OF ACTION.

## I.

This defendant admits that it is and was during all the times mentioned in the plaintiff's complaint a corporation organized and doing business under the laws of the State of Kentucky and having an office and place of business at San Francisco, and engaged in interstate commerce by railroad in the State of California.

## II.

Defendant denies that in violation of the Act of Congress or amendments thereto set forth in the



plaintiff's complaint or in violation of the order of the Interstate Commerce Commission referred to in said complaint, the defendant on November 13, 1930, operated on its lines of railroad one train, to wit: its own transfer consisting of thirteen or any number of cars drawn by Locomotive Engine No. 1198, or that said train or any train was at said time or place being operated by the defendant over a part of a highway of interstate commerce. [17]

### III.

Defendant denies that on said or any date it operated said train as aforesaid, or any train, over its or any line of railroad from Sixth Street Yard to Mission Bay Yard at San Francisco, in the State of California or elsewhere when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, or when less than 85% of the cars which composed the said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

### IV.

This defendant denies that by reason of the said or any violation of the said Act of Congress or amendments thereto the defendant is liable to the plaintiff in the sum of One Hundred Dollars (\$100) or in any other sum.

And for a FURTHER AND SEPARATE DEFENSE to said fifth cause of action, defendant alleges:

## I.

That on November 13, 1930, it hauled on its line of railroad certain cars drawn by Locomotive Engine No. 1198 from Sixth Street Yard to Mission Bay Yard at San Francisco in the State of California; that the said movement was solely a switching movement between yards less than 3000 feet apart and not upon, across or over any main line tracks; that said movement was done at slow speed, to wit: a speed not in excess of five miles an hour; that said movements were made solely [18] for the purpose of picking up and setting out cars at and between the said yards; that such movement was not over a part of a highway of interstate commerce and was not performed under conditions where it was either necessary or practicable to have the brakes on said cars, or any of them, used and operated by the engineer of said locomotive engine.

WHEREFORE, the defendant prays that the plaintiff take nothing by said action and that the defendant be discharged, with its costs.

H. C. BOOTH,

A. G. GOODRICH,

Attorneys for Defendant. [19]

State of California,  
City and County of San Francisco.—ss.

G. L. King, being first duly sworn, deposes and says:

That he is an officer, to wit: Assistant Secretary,

of Southern Pacific Company, the defendant in the within entitled action, and makes this verification for and on its behalf; that he has read the within and foregoing answer, knows the contents thereof, and the same is true of his own knowledge, except as to those matters and things therein stated on information and belief, and as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 13th day of March, 1931.

(Notarial Seal)

FRANK HARVEY,

Notary Public in and for the City and  
County of San Francisco, State of Cali-  
fornia.

Service of the within Answer is admitted this 13th day of March, 1931.

GEO. J. HATFIELD,

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 13, 1931. [20]

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(Title of Court and Cause.)

STIPULATION WAIVING JURY TRIAL.

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled action, through their respective counsel, that trial by jury

of the said action be and the same is hereby expressly waived.

Dated: June 16, 1931.

GEO. J. HATFIELD,

Geo. J. Hatfield,

United States Attorney,

(Attorney for Plaintiff)

A. G. GOODRICH,

(Attorney for Defendant)

[Endorsed]: Filed Jun. 17, 1931. [21]

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(Title of Court and Cause.)

### OPINION.

NORCROSS, District Judge:

This is an action under the Safety Appliance Acts, 45 U. S. C. A., Sec. 1 et seq. The complaint alleges five causes of action based on five transfer movements of cars made during September, 1930, between the Mission Bay unit and the Sixth Street unit of defendant's yard in San Francisco. The movements consisted of 10, 26, 20, 8 and 13 cars, respectively, and in each instance the air brakes were not under the control of the enginemen due to the air hose being disconnected.

The Mission Bay unit and the Sixth Street unit are within an area less than 4,000 feet square. The two units are connected by a line of track paralleling Seventh Street on the southwest side of defendant's yard for a distance of [22] approximately 2500 feet,



the total length of the line being approximately 4,000 feet between the terminal points where it connects with the assemblage of switching and classification tracks of the respective units.

The line in question does not directly connect with the main line of defendant which parallels it along Seventh Street. With the exception of six yard switch connections along Seventh Street it does not cross any other track of defendant or that of any other railroad. Between the two units the track crosses eight public streets at grade, the majority of which are protected by crossing watchmen during daylight hours. Upon none of the streets so crossed are street car lines.

In none of the movements complained of were any cars picked up or set out en route, and in each instance the assemblages of cars moved as a unit, the switching necessary to make up or break up these transfer movements being done before the transfer started on its journey or after arrival at destination. These movements were wholly within yard limits, and were made by yard engines and yard crews and under the direction of the yard-master. Two of the five movements were made by the locomotives pushing the cars.

~~In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased.~~



The question of law presented is whether the movements of cars as above described were train movements within the meaning of the statute, or mere switching movements.

In support of plaintiff's contention that these were train movements the following cases are cited: United States [23] v. Erie R. R. Co., 237 U. S. 402; United States v. Chicago B. & Q. R. R. Co., 237 U. S. 410; Louisville & Jeffersonville Bridge Co. v. United States, 249 U. S. 534; United States v. Northern Pacific Ry. Co., 254 U. S. 251; Great Northern Ry. v. United States, 288 Fed. 190; Illinois Cent. R. Co. v. United States, 14 Fed. (2d) 747; Chicago, St. P., M. & O. Ry. Co. v. United States, 36 Fed. (2d) 670.

In the Erie case cited the "transfer trains" under consideration moved from Jersey City and Weehawken to Bergen, and vice versa. "They were made up in yards like other trains and then proceeded to their destinations over main line tracks used by other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main line transportation \* \* \* over switches leading to other tracks and across passenger tracks whereon trains were frequently moving."

In the Chicago, Burlington & Quincy case there was presented the question of movements of cars at Kansas City between two freight yards "on oppo-

site sides of the Missouri River, the distance between their nearest points being about two miles. The track connecting them is one by which passenger and freight trains enter and leave the city, in other words, a main-line track. For a distance of 3,000 feet it is upon a single track bridge spanning the river, and off the bridge it intersects and passes through the Union Depot tracks. Besides its use by the defendant's trains, a considerable portion of it is also the line by which the passenger trains and some of the freight trains of the Rock Island and Wabash railroads enter and leave the city."

In the Louisville & J. Bridge Co. case the cars were [24] assembled in the yard of the Bridge Company "preparatory to their transfer westerly and delivery into the Illinois Central yard. \* \* \* the cars entered upon a track of the Illinois Central Railroad Company, used as a main line by both the Big Four and the Chesapeake & Ohio companies. \* \* \* ".

In the Northern Pacific case the cars were moved upon a line used by two independent companies "for freight trains under air control and the passenger trains of another company cross it."

In the Great Northern case the twenty-four cars there involved "were pushed by an engine from this point ("P" yard) to a point west of Lyndale Avenue Bridge known as the 'Hay' yard north of the main tracks. To reach this place they moved east from the 'P' yard; crossed the east line main track

to the west line main track, and proceeded east on this track to the lead at the 'Hay' yard where the cars were distributed to certain industries and delivery tracks."

In the Illinois Central case the track in question in addition to crossing certain streets at grade, crossed "some switch tracks of the Chicago & St. Paul Railroad at Fourteenth Street, and the Missouri Pacific tracks at California Street; also that a portion of this track \* \* \* was jointly used by defendant and the former road."

The Chicago, St. Paul, M. & O. Ry. Co. case involved the movement of sixteen cars as a unit by a locomotive used for switching purposes from the south part of its yards in Omaha north, a distance of one and one-fourth miles to where the railroad's freight trains were commonly made up. "Four city streets used by the public were crossed, and two tracks of other railroads, not used for main line traffic, were crossed. The track over which the movement was made was a [25] lead from the interchange track, on which the cars were assembled, to the north yard." During the movement in question "one stop was made at a railroad crossing."

The Chicago, St. Paul, etc. Co. case last referred to, upon the facts is more nearly like the case at bar than any of the others cited. In that case, however, there is the important distinction that two tracks of other railroads were crossed and one stop required to be made before making such crossing.

Commenting on the facts involved in the Erie case the Supreme Court said:

“They were made up in yards like other trains and then proceeded to their destination over main line tracks used by ‘other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations,’ \* \* \*.”

In the case at bar the movements were within a single yard between two units thereof and on a track having no connection with any but switching tracks. They were upon a track in fact set apart for switching operations.

In the Louisville & J. Bridge Co. case the court said:

“The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it can not, therefore, with propriety be called a switching movement.”

While in the case at bar the movement of cars between the two units of the yard was a transfer of the cars as a [26] unit, such transfer was not “from one terminal into that of another company for delivery,” and, also, did not involve “a main line track movement.”



It is important to note that in the last mentioned case the court further said:

“This is not only a train movement but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety of employees, of passengers and of the public which it is the purpose of the act to secure,  
\* \* \*.”

In the Northern Pacific Co. case the Supreme Court said:

“A moving locomotive with cars attached is without the provisions of the act only when it is not a train; as where ‘the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains’.”

From this it does not necessarily follow that a movement of cars as in the case at bar is a train within the meaning of the statute where such movement is on a line which has no other connections except with switching tracks and which line in purpose and reality is but an extension of such switching tracks.

In the Great Northern case the court said:

“The mere fact that the Railroad Company designates a large stretch or tract as yard does not make every operation therein a switching operation. If so, the act could be avoided by including large areas in the term yard.”

The two portions of the yard designated units in the case at bar present quite a different situation



than is presented in the Great Northern case. The question whether it be a train or a switching movement must be determined by [27] the peculiar facts of each case. If the entire movement is within a designated yard that is a fact to be considered with other pertinent facts. As said in the Illinois Central case:

“The decisions turn upon the particular facts of each case. All of them contain many varying and conflicting factors, no one of which alone is controlling.”

The opinion of the Supreme Court in the Chicago, Burlington and Quincy case is illuminating. From it we quote the following:

“The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect. \* \* \* Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute’s application lies in the essential nature of the work done rather

than in the names applied to those engaged in it.”

As said by the Circuit Court of Appeals of this Circuit in *Hill v. Carter*, 47 Fed. (2d) 869, 871:

“In considering \* \* \* the extent that any decision may be considered as controlling or an authority upon a particular question presented for determination in an instant case, it is well always to have in view the [28] maxim never better expressed than in the language of Chief Justice Marshall in the celebrated case of *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257: ‘It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. \* \* \*.’”

The conclusion reached upon the facts presented in the case at bar is that “the essential nature” of the movements in question was switching, and not train movements.

Judgment for defendant.

FRANK H. NORCROSS,

District Judge.

[Endorsed]: Filed Nov. 27, 1931.

[29]

(Title of Court.)

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 27th day of November, in the year of our Lord one thousand nine hundred and thirty-one.

PRESENT: the Honorable Harold Louderback,  
District Judge.

United States of America,

vs.

No. 18910

Southern Pacific Company

This case, having heretofore been tried before and submitted to the Hon. Frank H. Norcross, now being fully considered, it is Ordered that Judgment be entered in favor of the defendant in accordance with a memorandum opinion of the Hon. Frank H. Norcross, this day filed. [30]

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(Title of Court and Cause.)

#### STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that in the opinion rendered in the above entitled case by Honorable Frank H. Norcross, filed November 27, 1931, in the office of the Clerk of said Court, the following paragraph appeared:

“In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased.”

IT IS FURTHER STIPULATED that on the 14th day of December, 1931, the Honorable Frank H. Norcross, Judge of the above entitled Court, sent the following letter to the Clerk of said Court:

“Walter B. Maling, Esq.,                      December 14th,  
Clerk United States District Court,      1931  
San Francisco, California.

Re: United States v.  
Southern Pacific Co.  
No. 18910-L.

Dear Mr. Maling:

Upon again reviewing the decision in the above mentioned case filed by you on November 27th last I have decided to correct the same by eliminating on [31] page 2 of the opinion the following statement:

‘In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased.’

You are authorized to delete from the opinion the foregoing paragraph, and this letter will



be regarded as your authority for so doing.

With kindest regards,

Sincerely yours,

(Sgd) FRANK H. NORCROSS."

Dated this 29th day of December, 1931.

GEO. J. HATFIELD,

United States Attorney,

LUCAS E. KILKENNY,

Assistant U. S. Attorney,

Attorneys for Plaintiff.

HENLEY C. BOOTH,

A. G. GOODRICH,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 29, 1931.

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In the Southern Division of the United States  
District Court for the Northern  
District of California.

No. 18910-L.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

### JUDGMENT.

This cause having come on regularly for trial upon the 30th day of July, 1931, before the Court sitting without a Jury, a trial by Jury having been



waived by written stipulation filed: L. E. Kilkenny, Assistant United States Attorney, appearing as attorney for plaintiff, and Henley C. Booth and A. G. Goodrich, Esquires, appearing as attorneys for defendant, and the trial having been proceeded with on the 31st day of July, and oral and documentary evidence having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having rendered its decision and ordered that judgment be entered herein in favor of defendant, together with costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from said plaintiff, its costs herein expended taxed at \$

Judgment entered this 27th day of November, 1931.

WALTER B. MALING,

Clerk. [33]

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(Title of Court and Cause.)

STIPULATION AND ORDER EXTENDING  
TIME WITHIN WHICH TO FILE  
BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that the

plaintiff, The United States of America, may have to and including the 2nd day of January, 1932, within which to prepare, file and serve its proposed bill of exceptions in the above entitled cause.

Dated: December 3, 1931.

A. G. GOODRICH,

Attorney for Defendant.

GEO. J. HATFIELD,

United States Attorney,

Attorney for Plaintiff.

It is so ordered:

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Dec. 3, 1931. [34]

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(Title of Court and Cause.)

PLAINTIFF'S BILL OF EXCEPTIONS.

The above entitled cause came on for trial before Honorable Frank H. Norcross, one of the judges of the above named court, at the Federal Building in San Francisco, California, on the 30th day of July, 1931.

There were present and appearing, Geo. J. Hatfield, United States Attorney, and L. E. Kilkenny, Assistant United States Attorney, on behalf of the plaintiff; and Mr. H. C. Booth and Mr. A. G. Goodrich, on behalf of the defendant.

The parties had theretofore, by written stipulation duly filed, waived trial by jury, and had agreed

to submit this cause to the Court.

Opening statements were made by Mr. Kilkenny on behalf of the plaintiff, and by Mr. Booth on behalf of the defendant.

Thereupon the following proceedings were had:

Mr. KILKENNY. Will it be stipulated by counsel that the Southern Pacific Company is a common carrier?

Mr. BOOTH. Yes.

Mr. KILKENNY. I have here a map that has been prepared by the Southern Pacific Company. Will it be stipulated that this may be introduced in evidence at the present time as being a true representation of the location of the tracks [35] over which the movements alleged in the complaint were made on the dates specified, and of the location of the various streets crossed, of the relative location of the yards between which the movements were made?

Mr. BOOTH. We will so stipulate, except that we do not stipulate that the movements were made between yards. They were made between a number of tracks shown on the map, in the neighborhood of Sixth Street, and between Townsend and Berry Streets, in San Francisco, and a number of tracks which the evidence will afterwards show are used for classifying cars, and which are commonly referred to as Mission Bay. It is our contention in this case that they were all a part of the San Francisco yard, and that it was not an inter yard movement.

(Testimony of Frank F. Engles)

Mr. KILKENNY. The stipulation, with that qualification will be satisfactory. We offer this map in evidence at this time.

Mr. BOOTH. And it may be more convenient for the Court to have a duplicate copy to examine on the bench. I have another one here, and with the permission of your Honor I will hand it up.

(The map was here marked "Plaintiff's Exhibit 1.")

Mr. KILKENNY. Will it be stipulated by counsel that the movements alleged in the complaint were made over the line that is represented in green color on the map; is that correct?

Mr. BOOTH. That is correct.

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FRANK F. ENGLES was thereupon called as a witness for plaintiff, who, being first duly sworn, testified as follows:

I am an inspector for the Interstate Commerce Commission; have been such since October, 1914, continuously up to the present time. My duties are to inspect safety appliances on railroad [36] equipment; to investigate accidents; to observe the violation of laws in the movement of equipment, as I did in this case. My duties were the same on November 10, 11 and 12, 1930.

Prior to entering the Government service I had



(Testimony of Frank F. Engles)

25 years' railroad experience, about 3 years as a brakeman, and about 22 years as a conductor and yardmaster; as a yardmaster about 9 years.

In course of my duty as inspector of safety appliances I made inspections in the yard of the Southern Pacific Company in San Francisco on November 10, 11 and 12, 1930. Inspector Hamilton was with me at these times.

On November 10, 1930, I observed a movement of cars of the Southern Pacific Company on tracks here in San Francisco; this was a movement at 10:05 A. M. by engine 1198 from the Mission Bay Yard to the Sixth Street yard.

Mr. BOOTH. Now, if the Court please, I don't want to interrupt the testimony of the witness, but we object to the witness characterizing these yards as yards, or these assemblies of tracks as yards, unless he knows they are yards.

Mr. KILKENNY. We will bring out what he means by that expression.

Mr. BOOTH. All right.

(Witness continuing):

By the term "Mission Bay Yard", I mean Mission Bay Yard as I understand it in my regular inspection work. I have made inspections there in this yard, in company with railroad officials of the car department, and they have designated to me this yard as Mission Bay Yard. It is located between the Sixteenth Street yard, or Sixteenth Street



(Testimony of Frank F. Engles)

viaduct, and I would call it the River Slip—a number of spur tracks that extend northward from Sixteenth Street, if I am correct in my directions. Referring to Plaintiff's Exhibit No. 1, what I mean by Mission Bay Yard is (indicating) this section of tracks that extend from Sixteenth Street in a general northerly direction; that is what was designated to me in my regular inspection work as the Mission Bay Yard, a strip or number of tracks that parallel Third Street. This strip of tracks is probably 500 or 600 feet wide or more; generally they run in a northerly and southeasterly direction; that is what I refer to as Mission Bay Yard.

(Thereupon, the part referred to as Mission Bay Yard was indicated by counsel by the letter "A"). [37]

Referring to this Exhibit, what I mean by the Sixth Street yard, are these tracks (indicating) extending in a northeasterly direction from Sixth Street, between Townsend and Berry Streets, extending clear up to Third Street.

(Thereupon, the part last referred to by the witness was indicated by counsel by the letter "B".)

At the time these movements I have spoken of were made, the tracks indicated by the letter "A" were used for the purpose of assembling cars into trains, and transfers, etc., and for the purpose of assembling cars, I presume, for loading at different industries. It is called the make-up and break-up

(Testimony of Frank F. Engles)

yard. When I say industries, I refer to some warehouses along Third Street. Down at the channel, marked "Channel" on this Exhibit, they frequently load bananas from boats onto refrigerator cars. The channel is a strip of water that runs in a northeasterly and southwesterly direction; boats come in there.

After the arrival of the train movement at the point indicated by the letter "B", the train was broken up and placed at different points. Some of the cars were placed in what is known as the freight sheds—outbound and incoming freight sheds; others were placed at various tracks in that vicinity after arrival at Sixth Street.

The first movement, which was made on Nov. 10, 1930, consisted of a continuous line of cars hauled by the locomotive; this movement originated in the area marked "A"; while I don't know that I can indicate the exact location, it was somewhere north of the Sixteenth Street viaduct; I would say it began about 300 feet north of Sixteenth, and about 400 or 500 feet west of Third Street, as near as I can judge from this Exhibit. It moved over the tracks indicated by green colors; the tracks indicated by red colors are the main tracks over which passenger trains are moved in a southerly direction toward Los Angeles; no freight trains move over that line, so far as I have seen. During this movement over the green line, no cars were set out or picked up.

(Testimony of Frank F. Engles)

This Exhibit shows a number of streets; Barstow, Baggett, Hubbell, Irwin and Hooper Streets; they cross at grade the tracks indicated by green and red colors; I think five or six crossings were protected by flagmen. These were all where streets crossed. [38]

The movement on November 10th consisted of locomotive 1198 and 10 cars; the air brakes on these 10 cars were not under the control of the engineer; the air hose between the locomotive and head car in the train next to the locomotive was not coupled together; each of the 10 cars was equipped with air brakes; the locomotive was equipped with appliances for operating the air brakes on the cars.

I rode that train during that movement; after this assembly of cars entered the section marked "B", it stopped, with the engine being then at Sixth Street, after which the assembly or line of cars were broken up, and the cars were placed on different tracks, different cars on different tracks. I estimated this movement at approximately a mile; that was my judgment.

As to the movement on November 11, 1930, that began at 1:50 P. M. That was from the Sixth Street yard to the Mission Bay Yard, the reverse of the other movement. It consisted of locomotive 1159 and 26 cars. I also rode that movement; no cars were picked up or set out during the movement. All the 26 cars were equipped with air brakes and the locomotive was equipped with contrivances for operating the air brakes on these cars; but the

(Testimony of Frank F. Engles)

engineer could not operate the air brakes on the cars, because the air hose was not coupled between the locomotive and head car in the train. The distance over which this movement was made was approximately a mile; it crossed the same street crossings as the other movement, except in the opposite direction; I would judge that the traffic conditions were about the same; some of those streets are not used frequently by traffic; there is one street, which I think is called Sixteenth Street, that seems to be a through street that leads down to the Bay, and that is pretty well occupied by traffic; this traffic is mostly trucks; some pleasure cars. These movements crossed Sixteenth Street. There is a viaduct over the tracks at Sixteenth Street, and there is also a highway that leads under the viaduct; vehicles can either cross the railroad tracks at grade or over the viaduct. After this movement entered Mission Bay Yard, we did not watch it any further.

I also observed movement of cars in that same area on November 12, 1930; it took place at 3:00 P. M. and consisted of engine 1198 and 20 cars; it moved from the Sixth Street yard to the Mission Bay Yard, the same direction as the movement on the 11th. All cars were equipped with air brakes and the locomotive with equipment for operating air brakes; the air hose was not coupled between the locomotive and head car, so that the air brakes on the cars could not be operated. In this case, the



(Testimony of Frank F. Engles)

train was pushed ahead of the locomotive. We did not watch this train after it arrived in the Mission Bay Yard, and I do not know where the cars [39] were broken up, but it was after the line of cars had crossed Sixteenth Street. I also rode this train during the course of that movement.

I also saw a movement of cars on November 13; it consisted of locomotive 1202 and 8 cars; it began at 10:10 A. M. and was from Mission Bay Yard to the Sixth Street Yard; it was from approximately the region of the crossing of Sixteenth Street at the viaduct to the neighborhood of Sixth Street, in the region marked "B" in Exhibit No. 1. During the course of this movement no cars were picked up or set out. All the cars were equipped with air brakes, but they could not be operated by the engineer because the air hose was not coupled between the locomotive and the head car. I rode this movement the whole way; it was broken up in the area marked "B", after the cars had reached Sixth Street.

I also observed another movement that day, consisting of locomotive 1198 and 13 cars, from the Sixth Street Yard to Mission Bay Yard, beginning at 2:16 P. M., which I also rode. No cars were set out or picked up. All cars were equipped with air brakes, but they could not be operated as the air hose was not coupled between the locomotive and the head car. This line of cars was pushed ahead of the locomotive.



(Testimony of Frank F. Engles)

From a casual observation, I did not notice much difference in the traffic; it was about the same on all occasions.

I did not notice any difference in the number of flagmen that were stationed at the crossings on any of these occasions. I believe those are stations that have men at them, at these crossings during certain hours of the day. I do not know positively when they were on duty, but I would say from 8:00 A. M. to 6:00 P. M. There is a sign on each flagman's cabin that indicates the hours that he is on duty and the hours that he is not there. It is my recollection that they were wherever it was indicated they should be on duty between those hours.

The various movements, I believe, crossed eight streets at grade. In the case of the movement from the area indicated by "B" they would also cross Sixth Street, making 9 crossings. On each occasion when the movement was going toward Mission Bay it started across Sixth Street; and when the movements were made in the reverse direction, they stopped short of Sixth Street.

On each of the occasions the length of the movement was approximately the same. [40]

### CROSS-EXAMINATION.

As to the speed of these movements, I made a note of the time they departed and the time they arrived. The movement on the 11th left Sixth Street at 1:50 P. M.; arrived at Mission Bay Yard

(Testimony of Frank F. Engles)

at 2:10 P. M.; an interval of 20 minutes that would be at the rate of three miles an hour; they did not consume all of that time in making the movement; they may have been stopped en route. The engineers would stop these movements with the locomotive and tender brakes. Whether or not it would be a difficult matter to stop a train at a speed of five or six miles an hour on a level track with those brakes would depend on circumstances. I would say that these transfers were operated between five and ten miles an hour. I would not say exactly five miles an hour; they may have exceeded that, or they may not, in some instances.

The type of the locomotives used is what is classified as a switch engine; this is an engine that is customarily used by the Southern Pacific and other railroads in handling cars for the making up and breaking up of trains, called the classification of cars, and the spotting of cars at industry locations, and the taking away of cars from industries. They are equipped a little differently from the so-called road engine which is sent out with a freight or passenger train after that train has been made up; the constructions may be a little different; they are not entirely used as road engines. Still, I have seen a great many road engines used in switching service, engines that were really road engines. When these engines were used in switching service, they were generally equipped as a switch engine, with safety appliance standards.

(Testimony of Frank F. Engles)

Referring to the red line in Plaintiff's Exhibit No. 1, which I spoke of as main line tracks, these tracks proceed to the south through Tunnel No. 1, shown on this map, and then on through Tunnel No. 2, and so on, to a location on the railroad line known as the Bay Shore. I don't know it to be the general practice of the Southern Pacific to make up and break up trains at Bay Shore, which is about four miles to the south of Tunnel No. 1.

Q. Do you recall seeing any freight trains fully made up and drawn by a road engine entering the area or district marked on Plaintiff's 1 with the letter "B"?

A. Yes, I have.

Q. On what occasion?

A. On these particular occasions that I have testified to here.

Q. Then you call those freight trains?

A. They are freight trains in the sense of the law, I believe. [41]

Q. That will be a matter for argument here, I think. When I speak of a freight train in this series of questions, I mean a train that is coming into San Francisco with loaded or empty cars, and with a road engine and a caboose, and all the usual equipment of a road freight train.

A. I don't believe I could qualify on that, because I am not there at all times.

I have no record of how many of these ten cars in the first transfer were loaded or empty. As to

(Testimony of Frank F. Engles)

all the movements, I believe there were mixed loads; I don't know as to how many loads or empties there were.

As to the movements going toward Mission Bay, as I recall it, the cars extended back on Sixth Street toward Third; they were made up in that location; the engine was coupled on the west end, with the exception of the two movements that were shoved ahead of the engine. As to the movements from the Mission Bay district, I did not notice whether in any of those cases the switch engine, which was ahead of the cars, was entirely out of the area marked "A" and on the green line, while some of the cars were back on the area marked "A". I believe we observed the engines as they came out of the Mission Bay Yard at about the viaduct at Sixteenth Street on those movements. I believe the viaduct at the south end of area "A" is approximately correctly shown by a cross on Plaintiff's Exhibit No. 1. As far as I know this viaduct, on each of the occasions to which I have testified, was available for the use of trucks and other vehicles which desired to pass over the railroad tracks without being subjected to the hazard of a collision with any train.

None of these movements had cabooses on them. "Markers", as railroads use that expression, consist of lanterns by night and flags by day to indicate the rear of the train.



(Testimony of Frank F. Engles)

Mr. BOOTH. Did any of these transfers carry markers, either lanterns or flags?

Mr. KILKENNY. We object to that, your Honor, as immaterial, irrelevant, and incompetent.

The COURT. The objection is overruled.

Mr. KILKENNY. We note an exception.

The COURT. The legal effect of it, if any, can be discussed in argument.

(Witness continuing):

None of them carried markers. In my official capacity as inspector, I have credentials which I can display to railroad officials and employees; these are issued by the Bureau of Safety of the Interstate Commerce Commission. I presume if we [42] desired to that we would have no difficulty in ascertaining whether a given train or a given transfer of cars was moving on a time table. I made no inquiry to ascertain that fact, so I can not say whether they were time table movements. I do not know whether any of the movements were made on train dispatcher's orders. Without referring to certain records, I believe the 10th was the first day, as near as I can remember, that I was in and about the premises to which I have testified; the movements occurred on the 10th, 11th, 12th and 13th of November, 1930. I rode each of the trains. Mr. Hamilton was with me. At times we inspectors travel in pairs. Neither of us, to my knowledge, requested any Southern Pacific official, or subordinate official or employee to accompany us



(Testimony of Austin D. Hamilton)

on these movements. I could not say whether or not any of the cars that moved into the area marked "A" to which I have testified, were transferred to industries, or to other railroads, or to water carriers. As to cars I have testified that moved into the area marked "B" on Plaintiff's Exhibit No. 1, I saw some placed at the freight house in that area, but cannot testify as to the particular cars. This freight house is the sheds on Berry Street, shown on Plaintiff's Exhibit No. 1, lying just northwest of the channel; they run parallel with the channel in the area marked "B". I could not say whether the cars I saw placed or spotted at these sheds were loaded or unloaded.

### REDIRECT EXAMINATION.

As to the air brake equipment on a switch engine and a road engine, there may be some difference on some engines, and it may be alike on others.

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AUSTIN D. HAMILTON was thereupon called as a witness for plaintiff, who, being first duly sworn, testified as follows:

I am an Inspector for the Bureau of Safety, Interstate Commerce Commission; have been so engaged since September 30, 1914. I was so engaged on the 10th, 11th, 12th and 13th of November, 1930. I have had about twenty-five years in train service

(Testimony of Louis P. Hopkins)

as brakeman, conductor, and yardman. I was with Mr. Engles when he made the inspections he testified to. I heard all his testimony about the movement of cars on the Southern Pacific tracks over the line shown in green on Plaintiff's Exhibit No. 1, between the areas marked "A" and "B". I was there on all those occasions; I also rode the movements that he testified, and with him.

(It was thereupon stipulated by counsel that the witnesses direct and cross-examination would be the same as Mr. Engles.) [43]

Mr. KILKENNY. That is the Government's case, your Honor.

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LOUIS P. HOPKINS, was thereupon called as witness for the defendant, who, being first duly sworn, testified as follows:

I am employed by the Southern Pacific Company as trainmaster; have been so employed for thirteen years at Carlin, Nevada, Watsonville, California, and San Francisco, California; have been continuously employed in San Francisco for three years. From November 10th to 13th, inclusive, 1930, I was employed at and familiar with the San Francisco yards as trainmaster. I am also familiar with the track layouts and operations of the portion of that yard shown on Plaintiff's Exhibit No. 1. The red line represents the main track operating between San Francisco and the direction of Los

(Testimony of Louis P. Hopkins)

Angeles, a double track of railroad. Plaintiff's Exhibit No. 1 does not show all of the San Francisco yard. That yard extends south from Tunnel No. 1 to San Bruno, including the San Bruno station, and what is known as the old main track via Valencia Street, which includes sidings, at Burnell, Ocean View, Colma, and other spur tracks in that territory, including an area or district known as Bay Shore; that was also the case November 10 to 13, 1930. With the exception of the banana train on Friday night, the usual and ordinary practice of the Southern Pacific Company is to make up and break up freight trains carrying freight southbound from San Francisco, or northbound into San Francisco, at Bay Shore. The banana train is made up in the Mission Bay unit and leaves from that unit. This was also the practice in November, 1930, and prior thereto. There is one general yardmaster, Mr. J. G. Selden, who had at that time, and still has, jurisdiction over the San Francisco yard. He has yardmasters and assistant yardmasters in the various units of yards.

The distance from Tunnel No. 1 to Bay Shore, where these trains are made up and broken up is 4.1 miles. Neither before November, 1930, nor then, nor since then, have road freight trains come into San Francisco as road freight trains. As to how the freight trains which go to make up these road freight trains are taken out of San Francisco toward Bay Shore, and taken from Bay Shore into San

(Testimony of Louis P. Hopkins)

Francisco: they are moved in by what is termed a yard drag, a drag service between the two units of the yard; that extends to Mission Bay, Sixth Street, the Belt Line Transfer, the Sixteenth Street industrial territory, and other industrial territory around the [44] San Francisco terminal. Referring to Plaintiff's Exhibit No. 1, the Belt Line transfer starts at Second Street and runs toward the Ferry Building. It is shown down here opposite Block 264 and down through that way. It is directly to the south, you might say, of Block 264. The tracks are parallel; the short tracks are spurs. Block 264 is just west of Pier No. 30; it runs from there in a westerly direction up to the point that would be approximately opposite Pier 40.

These drags, as they come into the portion of the San Francisco yard north of Tunnel No. 1, and as they go out through Tunnel No. 1, are coupled with air; they use the main track entirely from San Francisco Tunnel No. 1 to Bay Shore. These drags enter and leave the main track at the area shown as "A", approximately just west of where Barstow Street is shown; you will notice there is a connection there that goes right through and goes into the main track, indicated by a black line; that is the connection from what we call the switching drill into the main track; they enter and leave the main track through that point.

We were not able to identify the drags that these gentlemen referred to in the complaint, for the rea-



(Testimony of Louis P. Hopkins)

son that no time was shown, but these engines that they enumerate there are operated in that territory, handling similar service, as they have called attention to. We have drags coming from the Bay Shore that go into "A"; we also have drags that go into "B". I might say that there are three drill tracks paralleling this main track. The track that the so-called Bay Shore drag uses is not the same as this switching drag was operated on that the complaint refers to. What I mean by a drill track, is a track that is used for switching purposes, drilling back and forth, and from which spur tracks and industries are taken off; that is to be distinguished from the main line track; that is an inside track that is independent of the main line track entirely, and on which no movements of main line travel are made. The track shown in green in Exhibit No. 1 is the connection between the area marked "A" and the area marked "B"; that was also true in November, 1930, and also before and since then; it was not used as a main line track in whole or in part; it is entirely separate and distinct from the main line track. The green track is what I refer to as the drill track. The lines shown on Exhibit No. 1 that connect with the green track and northeast of it, through blocks 130, 132, 134, etc., are industry tracks; they are strictly industrial tracks, spurs, for the purpose of serving industries with cars and taking cars away after they are loaded; they are in no sense main line tracks. Except for the banana



(Testimony of Louis P. Hopkins)

train, none are made up in the area shown on this map. [45]

I am familiar with the engines testified to by the witness Engles; they are what we call the S. W. switch type; they are engines without a pony truck; they are entirely equipped for switching purposes; they are not used for any other purpose. The handling of drags or cars over the line marked green in Plaintiff's Exhibit No. 1 are not schedule time table movements; they are not made under the direction of a train dispatcher; these movements are made under directions originating with the general yardmaster, being directly handled by yardmasters, under his direction; the yardmaster in this case would be what we call a desk yardmaster who sits at Fourth and King Streets—Fourth and Berry.

Transfers or drags of cars during the period testified to by the two inspectors are not handled by road crews, that is, engineers, brakemen, firemen, and conductors that regularly run on road freight trains; they are yard crews. In the case of engine 1198, the engineer in that case is restricted to yard service; we have quite a few of the same cases in the terminal.

As to the use of the west end of this green line for switching purposes, that is, the end nearest Sixth Street, that is a territory that serves the freight sheds; in addition to that, it serves industries that reach down as far as Third and Berry

(Testimony of Louis P. Hopkins)

Streets, Third and Channel, which can be identified as the Southern Pacific Terminal Building. In the territory between that and Sixth Street, there are several spurs serving lumber yards, rock bunkers, and sundry industries in the territory. This green line is used by engines in switching for the sheds, and in making what we would call a double freight movement, doubling from one track to another. On drags of thirty cars, the engine would be approximately half of the distance on the straight green line between "B" and "A". That would be about between Irwin and Hubbell. In the reverse direction, an engine switching or doubling a long drag in the part marked as "A", if it were possible for the two of them to be working on that lead at the same time, the engines would almost come together on the green line; it is a single track lead there. There are three tracks in there; the No. 2 lead is next to the main track; the No. 3 lead is the lead that is used to Mission Bay; No. 4 is a drill lead off which these spurs lead that you asked me about a few minutes ago; that is only used as an emergency lead; this is a single track lead in the movements that are referred to. In November, 1930, prior thereto and since, the green line tracks have customarily been used in these switching operations that I have been describing; for a period of years there has been no change in the movements there.

When I speak of doubling over, I mean by that, taking a drag of twenty cars, that ten cars might [46]

(Testimony of Louis P. Hopkins)

be on one track and ten on another in the area marked "B"; in other words, the engine has to pull maybe ten cars off one track and pull them out a sufficient distance to get over the switch and throw the switch, and then back up on the others to complete the drag. The approximate length of a drag of ten cars would be 440 feet for the ten cars, and about 70 feet for the engine, which would make about 510 feet.

I heard Mr. Engles' testimony about how these transfers could be handled with braking power, if there were no air brakes coupled up. I do not agree with that testimony. The crew are required by rule to be distributed over the tops of these cars to manually control them by hand brake, if necessary. Ordinarily, the brakes on the engine could handle a drag such as has been described here, running from eight to twenty-six cars, at the speed at which they were operated. The best proof that they could be handled is that they have been handled that way, to my knowledge, for twenty-five years, without accident.

As to the form of crossing watchman protection at the main streets, beginning at Sixth Street: At Sixth Street, ordinarily, the engine, in starting from that territory would be south of Sixth Street proper; after leaving Sixth Street the first crossing that is made from between the freight sheds is Berry Street; at this point there is a crossing watch-

(Testimony of Louis P. Hopkins)

man between seven A. M. and six P. M. The next open street is Hooper Street; there is no protection at that crossing. The travel on Hooper Street is negligible; the same applies to Irwin, Hubbell and Daggett; the company maintains crossing watchmen at Irwin and Hubbell Streets, but not at Daggett. Barstow comes into Sixteenth Street and is not across the tracks. There is a flagman for twenty-four-hour periods at Sixteenth Street. Continuing around, you again cross Sixteenth Street at the mouth of Mission Bay, where there is a twenty-four-hour watchman service.

As to the character of the travel on Irwin, Hubbell, and Daggett Streets, as shown on Plaintiff's Exhibit No. 1; In the morning, probably from seven to nine, there will be a few truck movements reaching industries that are in the territory served by the spur tracks shown on this map. Again, there will be infrequent movement over these tracks throughout the day.

The viaduct over Sixteenth Street is shown with approximate correctness on Plaintiff's Exhibit No. 1. That viaduct was built through a franchise arrangement; am not sure of the year, but I think it was around 1914. It was [47] made to direct the traffic away from the grade crossing on Sixteenth Street, which is continuously blocked by our engines in switching Mission Bay; we block Sixteenth Street as much as thirty minutes to an hour at a



(Testimony of Louis P. Hopkins)

time. That is the street with the greatest volume of traffic in that neighborhood. Berry Street in the early morning is a heavy traveled street and is busy. There is nothing to prevent the driver of trucks or other vehicles from using this viaduct when the crossing is blocked, or if they fear they might collide with or be collided by some locomotive or string of cars. The reason they do not use it is that the grade is pretty stiff on the approach; also trucks use it, also pleasure automobiles. The ones that do not want to use it just have to wait until the crossing is unblocked.

The area of tracks used by the railroad and marked "A", is for assembling cars from industrial sections, transfers, and from boats arriving in Mission Bay slip into drags, where they are taken to Bay Shore and segregated for train movement. There are three different units in that system of tracks in the area marked "A". There is what we call the Elliott yard, there is the hay yard, and there is the Mission Bay unit. These units are all in the Mission Bay area. There are also industrial tracks in the district down in the vicinity of the channel. In addition to that, there is a system of team tracks in what is known as the hay yard. That is all reached from this point here—that is an extension of the green line. These tracks are also used for preparing cars for special commodities, such as for sugar. They are also used for cars to be transferred



(Testimony of Louis P. Hopkins)

to the Atchison, Topeka & Santa Fe Railroad; the segregation is made at that point. The extension of the Santa Fe tracks, where their switching is done, is shown on the map, just west of Piers 48 and 50; it goes on down. Their particular yard is in China Basin. All cars received from the Santa Fe, and also from the Western Pacific, and also from Southern Pacific boats, through the point shown as S. P. Ferry Slip, are segregated into drags in this Mission Bay area, and hauled in solid drags to the Belt Line transfer. That includes cars that arrive through those agencies that are delivered all the way from Townsend Street to Fort Mason. Fort Mason is not shown on this map; it is north of the portion shown as Union Ferry Station.

Passenger trains coming in and going out of San Francisco from the Third and Townsend Street station use the red line main track entirely. The passenger yard extends from Seventh Street to Third, and are an entirely separate set of tracks from those cited in the complaint; we do not use that for freight purposes. The only [48] freight movement that is made over there is that a drag that is coming in from either Mission Bay unit or the Bay Shore unit going to Sixteenth Street territory pulls down through the interlocking plant and backs out Townsend Street.

The traffic at night is practically nothing. It is very, very infrequent on all of them, including Six-

(Testimony of Louis P. Hopkins)

teenth Street; that is, Sixteenth Street after nine o'clock at night, and on Berry Street after six o'clock at night.

As to the physical condition of these grade street crossings and the ability of drivers and pedestrians to see an approaching train on the green line, they are wide open crossings; there is no obstruction of the view.

The railroad term "classification" as applied to freight cars, is that portion of the yard that is used for segregating cars to units, for different train movements, for delivery to other carriers, and with boat connections, and rail connections. I would say that it would be very proper to call the area marked "A" a classification unit or area.

Now, as to the area marked "B", that is used for other purposes. The territory in "B" is more of a freight shed territory, and other industries, of course, that are reached in that territory, as well as the tracks that are known as 47 and 48, which are used as an assembly track; in other words, cars in this territory, as they are taken out, are thrown over there, and as they assemble into a suitable drag they are taken to Mission Bay for movement and connections, or to Bay Shore for train movement. Taking a typical case for illustration: Suppose a drag of twenty cars comes from Bay Shore and goes through Tunnel No. 2 and Tunnel No. 1, and leaves the main line track just south of Barstow Street; it does not touch the green line track coming from

(Testimony of Louis P. Hopkins)

Bay Shore; then supposing, in that drag of twenty cars, we have some of them that are to be taken across San Francisco Bay by the car ferry, and some of them that are going to the Santa Fe, and some of them that are going to these sheds E. F., and G, shown in the area marked "B", that drag of twenty cars would be segregated in the area marked "A" and the cars that went to the Santa Fe would be transferred to it, and those that were to go up to the area marked "B" would be taken to it over the green line. Now, taking a typical drag of cars moving from "B" to "A" over the green line; they might consist of several different classes of cars, some to go across the bay on the car ferry, some to be transferred to the Santa Fe, and some to the Western Pacific, and some to the Belt Line. The reason for taking them there, is that that is the segregating point for San Francisco cars; it [49] would not be possible to do the segregating at the area marked "B".

This green line does not cross any street car tracks, nor any main line railroad tracks of this or any other railroad.

As to the necessity or convenience to go upon any main line track in going from "A" to "B", or from "B" to "A", there is no point that you can go from this drill track to the main track, except through the connection which is in the vicinity of Sixteenth Street; it is shown in a black line, just about east of Block 32. There is no connection between King

(Testimony of Louis P. Hopkins)

Street and Sixteenth Street, between this drill or any of the drills and the main tracks. By "this drill," I refer to the green line as shown on Plaintiff's Exhibit No. 1, for the reason that there is another drill track between this green line, that is shown in the black line on this Exhibit and the red line which is the track that is used by Bay Shore drags going direct from Sixth Street to Bay Shore.

Mr. BOOTH. I am not sure whether you testified to this, but I will ask you again whether the drags that moved to or from either "A" or "B", from or to Bay Shore, are handled with the air coupled up?

Mr. KILKENNY. That is objected to as immaterial, irrelevant, and incompetent.

The COURT. The objection is overruled.

Mr. KILKENNY. Exception.

(Witness continuing)

The air is coupled on all drags between all units of the San Francisco yard and Bay Shore; they use the main line from a point near Sixteenth Street to Bay Shore; there is a filled-in trestle across the channel.

When Mr. Engles was counting the grade crossings, he referred to the grade crossing at Sixth Street; that is a grade crossing in the area marked "B". Fifth Street is a closed street.

Mr. BOOTH. Would the coupling up of air between the switching engines and the drags of cars on this green line result in a substantial additional



(Testimony of Louis P. Hopkins)

annual operating cost, as well as delay in operations? [50]

Mr. KILKENNY. That is objected to as immaterial, irrelevant, and incompetent. It has no bearing on the issues in this case.

The COURT. I am inclined to think the objection is good. I will permit the question to be answered, however. It may be discussed later.

Mr. KILKENNY. Exception.

Mr. BOOTH. I will say frankly that it has been held by the Circuit Courts of Appeal that the question of cost in safety matters is not a defense. I am asking the question more for the purpose of showing that we are not doing what we have been doing arbitrarily, and without any sound operating reason. It might be said to be a question of avoidance, looking at it in one way.

Mr. KILKENNY. I think counsel has confessed that the objection is good.

Mr. BOOTH. I think the admission would be harmless.

The COURT. That was my impression. It would not be a defense. We might as well not take the time to go into it. I will sustain the objection.

Mr. BOOTH. We note an exception. Will you state from your experience as an operating man, and your observation of the operation here complained of, whether the handling of drags of cars, as you have described them, on the green line without coupling air, and as described by the two wit-



(Testimony of Louis P. Hopkins)

nesses for the plaintiff, is a safe or unsafe operation?

Mr. KILKENNY. We object to that as immaterial, irrelevant and incompetent, and no bearing on the issues here. Any safety contrivance that they may have that is not specified in the law would have no bearing on the case.

The COURT. At this time the objection will be overruled.

Mr. KILKENNY. Exception. [51]

(Witness continuing)

I would consider moving at the slow speed that we have to move in this territory between the two units, that the measure of safety would be greater without air through the cars than it would be with air. This is for the reason that an emergency stop made at slow speed is more hazardous than a stop that is made by operation of the engine brakes alone, the reason being that the serial operation of brakes through a line of cars starts from the head car, and an emergency application does not give air a chance to equalize. The result is you are making a mountain on the head end, and the other cars come in against it and there are serious results throughout the cars, as well as on the rear end.

Mr. BOOTH. There are no cabooses on these drags of cars, are there, in which the crew rides?

WITNESS. No.

Mr. BOOTH. Where does the crew ride?

WITNESS. On top.

(Testimony of Louis P. Hopkins)

Mr. KILKENNY. If your Honor please, I want to move to strike out all of the answer of the witness to the previous question with regard to the comparative safety of different appliances upon the ground that it is immaterial, irrelevant, and incompetent. It has been held time and again by the Courts—by the Supreme Court—that any safety precautions that may be taken which are not prescribed by the law would not be a defense. It is entirely up to Congress to prescribe what shall be used.

The COURT. We will not take the time to argue that now. We will take that up later.

(Thereupon, an adjournment was taken until Friday, July 31, 1931, at 9:30 A. M.)

(Witness continuing on July 31, 1931, 9:30 A. M.)

The length of the San Francisco yard from the Southern Pacific passenger station shown on Plaintiff's Exhibit No. 1 is 11.2 miles; this includes certain portions of the track lay-out at San Bruno. [52]

I want to make a correction in my testimony yesterday. My attention was called to the fact that I stated there was a crossing flagman at Hubbell and not at Hooper. It should have been reversed; it should be at Hooper and not at Hubbell.

Referring to the move of drags of cars to and from Bay Shore when air was used: We have in that service two types of engines, one known as a consolidation type or a road engine that has been converted to a switch engine by removing the pilots

(Testimony of Louis P. Hopkins)

and applying foot boards; in that type of locomotive the speed on the main track is thirty-five miles an hour. On the switch type it is twenty miles an hour. Twenty miles an hour on the main track is the company's limitations on the speed of these switch engines. Where the engine is pulling a move on the green line shown on Plaintiff's Exhibit No. 1 over this drill track, the speed will average between six and eight miles an hour; when the engine is shoving the cars ahead of it the speed will average between four and five miles an hour. The drags that are moved on the main line to and from Bay Shore will average two or three times as many cars as drags on the drill track.

### CROSS-EXAMINATION.

Referring to Plaintiff's Exhibit No. 1, the track that is shown in green color is the one I have designated as a drill track. It is a fact that all of the movements of cars from the area that is marked "A" to and from the area marked "B" are made over the green track, but that track is also used as a switching lead to both "A" and "B". As to what I mean by a "switching lead": A drag that is being switched in the portion shown as "A", or Mission Bay, with a number of cars, will be half way down this track between "A" and "B" in a switching movement or moving from one track in "A" to another track in "A", in making a move. What I mean by that is this: We will pull, say thirty cars

(Testimony of Louis P. Hopkins)

out of "A" from probably different tracks, or probably make a straight move from one track in "A" to another track in "A". In making that move, the engine will be half way down the same track in a straight line between "A" and "B" in order to make the move. In making a similar move in "B" the same condition would exist; that is, a car movement may be made out of "A" onto that track shown in green, the locomotive proceeding about half way, and then these cars may be backed into the area "A" again onto another track; and a like movement may be made in the area "B". There is a parallel track to the green track that has spur tracks connecting, but not with the green track.

The speed of the movement of the cars shown [53] in green is designated by a rule of caution; the engineer must move according to conditions. The condition of switching movements on both ends of that green track make slow speed necessary. The speed is governed by the rule of caution in our book of rules, which requires that movements will be made with caution. Caution is described as moving at reduced speed according to conditions, prepared to stop short of a train, engine, and cars, or misplaced switch, or before reaching a stop signal, and where conditions require, the train must be preceded by a flagman.

#### REDIRECT EXAMINATION.

The rule under the heading "With Caution", on page 8 of the Southern Pacific Rules and Regula-



(Testimony of Louis P. Hopkins)

tions of the Transportation Department, reads as follows:

“To run at reduced speed according to conditions, prepared to stop short of a train, engine, car, misplaced switch, derailling rail or other obstruction, or before reaching a stop signal; where circumstances require, train must be preceded by a flagman.”

Cars are moved in drags, or transfers, or whatever they may be called, from the area marked “B” to the area marked “A”, for the purpose of segregation into drags at Mission Bay area for delivery to connecting lines, and for movement from Mission Bay to Bay Shore for train movement, as well as for delivery to industries in the Mission Bay area, or vice versa.

Cars moving in the reverse direction, that is from “A” to “B”, are cars that are brought in in drags from Bay Shore and Mission Bay, segregated for delivery to industries or sheds; also cars received from connecting lines through the transfer, as well as by the boat from Oakland and Sausalito.

Q. Are these cars that are to be delivered to the sheds shown in the area marked “B” arranged in order at Mission Bay, so that they can be spotted at the sheds without undue delay or operating cost?

A. Practically all the merchandise for loading at the freight sheds originate at Mission Bay area. In addition to that, merchandise arrives via boat at



(Testimony of Louis P. Hopkins)

Mission Bay slip and is taken from there to be spotted at the freight sheds.

Q. I want to read to you a definition of the word "train" as given by the United States Supreme Court through Mr. Justice Brandeis, [54] in the case of *United States v. Northern Pacific Railway Company*, 254 U. S., the opinion beginning at page 251, the portion from which I am reading being at the bottom of page 254:

"A moving locomotive with cars attached is without the provision of the Act only when it is not a train, as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains."

Can you say from your railroad experience, as well as from your personal knowledge of the situation here considered, whether the movements over the green line on Plaintiff's Exhibit No. 1, and testified to by the two interstate inspectors, are movements which come within that definition, movements as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains?

Mr. KILKENNY. We object to the question as immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness, and also for an answer that involves a conclusion of law, and not a question of fact. The Courts have passed on what

(Testimony of Louis P. Hopkins)

movements are switching movements, and what movements are train movements, as matter of law, under particular circumstances.

Mr. BOOTH. I suppose it may be fairly said from the decisions—and, of course, that is a matter of argument—whether a certain movement is a train movement or not. It is perhaps a mixed question of fact and law. It is more a question of fact than of law. Your Honor will find from the authorities that we will hereafter cite to you that the Courts have gone to great length to describe the physical conditions that exist surrounding a particular movement. In so far as this is a question of fact, we think it is competent for the witness to testify from his experience, and from his observations, whether the movements here made the subject of courts in the complaint fairly fall within the definition of the exception. As a question of law, of course, that is a matter [55] for the courts to decide.

Mr. KILKENNY. This is calling for an answer to the very question that is at issue in this case. The decision in this case depends upon whether or not this was a switching movement or a train movement. As I say, it is clearly a question of law as to which kind of a movement this is. It would at least be a conclusion of law.

The COURT. My present impression is that where the facts are shown there is nothing left but

(Testimony of John G. Selden)

a conclusion of law. The objection will be sustained.

Mr. BOOTH. We note an exception. That is all.

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JOHN G. SELDEN was thereupon called as a witness for defendant, who, being first duly sworn, testified as follows:

I am general yardmaster for the Southern Pacific Company at San Francisco Terminal. I have heard Mr. Hopkins' testimony as to the extent of that yard; it is correct.

As general yardmaster, I have three assistant general yardmasters, located at Fourth Street; three assistant yardmasters at Mission Bay; an assistant yardmaster and a yardmaster at Sixth Street; three yardmasters and three assistant yardmasters at Bay Shore. Their hours vary from eight A. M. to four P. M., and from four P. M. to midnight, and from midnight to eight A. M.

I heard the testimony of Mr. Engles, Mr. Hamilton and Mr. Hopkins. I agree with Mr. Hopkins that the line shown in green on Plaintiff's Exhibit No. 1 is a drill track from Mission Bay to Sixth Street. The district yardmaster directs the movement of cars over that line; he is located at Fourth Street, between Berry and King Streets; Block 150. He communicates by telephone. These trains of cars do not move over the green line under dispatcher's orders; nor under time tables. Switching crews man

(Testimony of John G. Selden)

the engines and drags; these drags are not regularly scheduled in any way.

Q. I want to ask you the same question I asked Mr. Hopkins, to which plaintiff's objection was sustained. I read from 254 U. S., at the bottom of page 254, a definition phrased by Mr. Justice Brandeis in the case there reported, [56] as follows:

“A moving locomotive with cars attached is without the provision of the Act only when it is not a train, as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains.”

And I ask you whether these moves on this green track shown on Plaintiff's Exhibit No. 1 are or were anything more than moves for the purpose of switching, classifying, and assembling cars or like moves for the purpose of making up trains or breaking up trains, or delivering cars for loading or unloading?

Mr. KILKENNY. We make the same objection we did to a similar question put to the former witness, on the ground that it is immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness, and asking for an answer to the very question at issue in this case. It is a conclusion of law.

The COURT. The objection is sustained.

Mr. BOOTH. We note an exception. Perhaps I



(Testimony of John G. Selden)

can shorten this direct examination, with the consent of counsel.

Q. Did you hear Mr. Hopkins' testimony as to the reason for moving cars over the green line from and to Mission Bay?

A. Yes, sir.

Q. Do you agree with the answers he gave to my questions on that subject?

A. I do.

Mr. BOOTH. That is all.

Mr. KILKENNY. No questions.

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Mr. BOOTH. The defendant rests.

Mr. KILKENNY. If your Honor please, at this time the plaintiff moves for a judgment in favor of the plaintiff and against the defendant on all the issues in this case, and [57] also moves the Court to make special findings of fact in this case in favor of the plaintiff, as follows:

This cause having been tried before the Court, the plaintiff requests the Court to make the following findings of fact:

1. On November 10, 11, 12 and 13, 1930, defendant operated over its line of railroad in the City of San Francisco, five "drags" or transfer movements of cars between its Mission Bay yard and its Sixth Street yard, a distance of approximately one mile, when the air brakes on each of those "drags" or



transfers was in use on the locomotives and tender only.

2. Each of the cars and locomotives used in the various movements were equipped with air brakes and in addition each locomotive was equipped with appliances for operating the air brakes on the various cars. In each instance the air hose between the tender and adjoining car was not coupled, thus making it impossible for the engineman on the locomotive drawing the "drag" or transfer to operate the air brakes on the various cars.

3. The number of cars in those "drags" or transfers varied from eight to twenty-six cars, exclusive of locomotive and tender. The movements were over tracks set apart for transfer movements of cars between the two yards and were not used by regular scheduled or main line trains. During the movements between the two yards some six or eight public streets were crossed at grade, crossing watchmen being stationed at the various crossings, and the movements were at a speed of about five miles an hour.

4. In each of the five transfer movements on the dates in question, the cars were moved as a unit from one yard to the other without any cars being set out or picked up en route, [58] and upon arrival at either of the two yards the individual cars were placed upon various tracks.

The following are the conclusions of law which we request the Court to make in favor of the plaintiff:

1. The movements of cars as set forth in the findings of fact were train movements within the meaning of the airbrake provisions of the Safety Appliance Acts, as modified by an Order of the Interstate Commerce Commission of June 6, 1910, which requires that at least 85% of the cars in any train shall be equipped with air brakes and under the control of the engineman on the locomotive drawing such train.

2. On November 10, 11, 12 and 13, 1930, defendant violated the Safety Appliance Acts in moving the five trains between its Mission Bay yard and its Sixth Street yard in the City of San Francisco, when none of the air brakes on the cars in such trains was under the control of the engineman on the locomotives drawing such trains.

I ask leave to file this.

Mr. BOOTH. If the Court please, the defendant resists and opposes the motion and asks that in lieu thereof the Court find and conclude that none of the movements of transfers referred to in the complaint or described in the testimony was a train movement, and that, therefore, there was not by any of said movements any violation of the Act of Congress known as the Safety Appliance Act, or the order of the Interstate Commerce Commission pleaded and described in each of the causes of action.

I believe the understanding is that we will file briefs, is it?

The COURT. I would like to have points and authorities cited.

Mr. KILKENNY. How will we proceed to do that? I [59] suppose we will open? Your Honor requires written briefs, do you?

The COURT. Well, I think I would like to have points and authorities. I don't know about a brief. I suppose you might call that a brief.

Mr. BOOTH. It was our thought yesterday afternoon that perhaps your Honor would like to have the benefit of reading the testimony.

The COURT. Yes, I would.

Mr. BOOTH. And also the map, and also have your attention called to the decisions of the Supreme Court and other Federal Courts, such cases as the parties desire to cite.

The COURT. Yes, I would.

Mr. KILKENNY. Will it be satisfactory that each side have fifteen days for submitting such points and authorities, the plaintiff to open?

The COURT. Fifteen to open, and fifteen to the other side to reply. Do you want any time for closing?

Mr. KILKENNY. We will not require any time for closing.

The COURT. And I understand the Court will have the benefit of a transcript of the testimony?

Mr. KILKENNY. Yes, the Court will be furnished with a transcript of the testimony.

Mr. BOOTH. Yes, your Honor.

The COURT. It will be understood that the case will stand submitted upon the filing of the briefs.

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The foregoing, consisting of twenty-five type-written pages, having been examined by me and found to be a true and correct transcript of proceedings had in this cause, may be and the same is hereby allowed and settled as the plaintiff's Bill of Exceptions herein. [60]

Dated this 26th day of December, 1931.

FRANK H. NORCROSS,  
United States District Judge.

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The foregoing proposed Bill of Exceptions may be allowed and settled without further notice.

A. G. GOODRICH,  
HENLEY C. BOOTH,  
Attorneys for Defendant.

[Endorsed]: Filed Dec. 29, 1931. [61]

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(Title of Court and Cause.)

PETITION FOR APPEAL.

Comes now the plaintiff, the United States of America, by its attorneys, and feeling itself aggrieved by the rulings of the court and final judgment entered in this cause of action hereby prays

that an appeal be allowed by the United States District Court for the Northern District of California, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition plaintiff herewith presents its Assignment of Errors.

Dated this 24th day of December, 1931.

GEO. J. HATFIELD,

United States Attorney,

LUCAS E. KILKENNY,

Assistant United States Attorney.

[Endorsed]: Filed Dec. 24, 1931. [62]

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(Title of Court and Cause.)

### ASSIGNMENT OF ERRORS.

Comes now the plaintiff, the United States of America, by its attorneys, and in connection with its Petition for Appeal, says, that in the record, proceedings and final judgment in the above entitled cause manifest error has intervened to the prejudice of the plaintiff, upon which it will rely in the prosecution of its appeal herein, to wit:

#### I.

The Court erred in overruling plaintiff's objections to the following question asked of the witness Hopkins by counsel for defendant and in permitting said witness to reply thereto, to which action of the Court plaintiff then and there duly excepted:



Q. Will you state from your experience as an operating man, and your observation of the operation here complained of, whether the handling of drags of cars, as you have described them, on the green line without coupling air, and as described by the two witnesses for the plaintiff, is a safe or unsafe operation?

A. I would consider moving at the slow speed that we have to move in this territory between the two units, that the measure of safety would be greater without air through the cars than it would be with air. [63]

## II.

The Court erred in refusing to enter judgment for plaintiff on the first cause of action, as requested by plaintiff, at the close of the testimony.

## III.

The Court erred in refusing to enter judgment for plaintiff on the second cause of action, as requested by plaintiff, at the close of the testimony.

## IV.

The Court erred in refusing to enter judgment for plaintiff on the third cause of action, as requested by plaintiff, at the close of the testimony.

## V.

The Court erred in refusing to enter judgment for plaintiff on the fourth cause of action, as requested by plaintiff, at the close of the testimony.

## VI.

The Court erred in refusing to enter judgment for plaintiff on the fifth cause of action, as requested by plaintiff, at the close of the testimony.

## VII.

The Court erred in entering judgment in favor of defendant on the first cause of action.

## VIII.

The Court erred in entering judgment in favor of defendant on the second cause of action.

## IX.

The Court erred in entering judgment in favor of defendant on the third cause of action.

## X.

The Court erred in entering judgment in favor of defendant on the fourth cause of action. [64]

## XI.

The Court erred in entering judgment in favor of defendant on the fifth cause of action.

WHEREFORE, for such errors, the plaintiff, the United States of America, prays that said judgment of the United States District Court for the Northern District of California, Southern Di-

vision, dated November 27, 1931, be reversed as to each of said five causes of action and the same remanded for a new trial.

GEO. J. HATFIELD,  
United States Attorney,  
LUCAS E. KILKENNY,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 24, 1931. [65]

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(Title of Court and Cause.)

#### ORDER ALLOWING APPEAL.

The plaintiff in the above entitled cause having prayed for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the proceedings and judgment made and entered herein by the United States District Court for the Northern District of California, Southern Division, on the 27th day of November, 1931, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors and prayer for reversal pursuant to the statute and rules in such case made and provided;

IT IS NOW HEREBY ORDERED that an appeal be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Cir-

cuit from the District Court of the United States for the Northern District of California, Southern Division, as provided by law, and

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and certify a Transcript of Record, proceedings and judgment in this cause and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit so that he shall have the same in the said Court within sixty days from this date.

Dated this 26th day of December, 1931.

FRANK H. NORCROSS,  
United States District Judge.

[Endorsed]: Filed Dec. 29, 1931. [66]

---

(Title of Court and Cause.)

### STIPULATION

for Transmission of Original Exhibit to the United  
States Circuit Court of Appeals and  
Order Approving Same.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the Clerk of this Court shall transmit plaintiff's Exhibit No. 1 filed herein to the United States Circuit Court of Appeals for the Ninth Circuit to be considered by

it in connection with plaintiff's appeal herein.

Dated this 24th day of December, 1931.

GEO. J. HATFIELD,  
United States Attorney,  
LUCAS E. KILKENNY,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.  
A. G. GOODRICH,  
HENLEY C. BOOTH,  
Attorneys for Defendant.

IT IS ORDERED that the Clerk of the Court shall transmit the exhibit described in this stipulation to the United States Circuit Court of Appeals for the Ninth [67] Circuit to be considered by it in connection with plaintiff's appeal herein.

Dated this 26th day of December, 1931.

FRANK H. NORCROSS,  
United States District Judge.

[Endorsed]: Filed Dec. 29, 1931. [68]

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(Title of Court and Cause.)

STIPULATION FOR DIMINUTION OF  
RECORD.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that in the printing of the Transcript of Record herein, the title of the Court and the title of the cause and captions on the pleadings and documents need not be



printed in full, but may be entitled thus ("Title of Court and Cause"), and that the endorsement on such papers and documents, except the filing endorsements may also be omitted.

Dated this 24th day of December, 1931.

GEO. J. HATFIELD,  
United States Attorney,  
LUCAS E. KILKENNY,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff,  
A. G. GOODRICH,  
HENLEY C. BOOTH,  
Attorneys for Defendant.

It is so ordered:

FRANK H. NORCROSS,  
United States District Judge.

[Endorsed]: Filed Dec. 29, 1931. [69]

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(Title of Court and Cause.)

PRAECIPE.

To the Clerk of Said Court:

Sir:

Please prepare and certify copies of such papers filed and proceedings had in the above entitled action as are necessary to a determination of plaintiff's appeal herein, and more particularly as follows:

1. Summons and Marshal's return.
2. Complaint.

3. Answer.
4. Stipulation waiving trial by jury.
5. Opinion and order for judgment.
6. Stipulation dated and filed December 29, 1931.
7. Judgment.
8. Stipulation and order extending time for bill of exceptions.
9. Bill of exceptions.
10. Assignment of errors.
11. Petition for appeal.
12. Order allowing appeal.
13. Stipulation and order for transmission of exhibits to the United States Circuit Court of Appeals.
14. Stipulation for diminution of record.
15. Citation.
16. Clerk's certificate.
17. This praecipe.

Dated this 18th day of February, 1932.

GEO. J. HATFIELD,  
United States Attorney,  
LUCAS E. KILKENNY,  
Asst. United States Attorney,  
Attorneys for Plaintiff.

Service of the within Praecipe by copy admitted this 18th day of February, 1932.

HENLEY C. BOOTH, and  
A. G. GOODRICH,  
Attorneys for Defendant.

[Endorsed]: Filed Feb. 18, 1932. [70]

(Title of Court and Cause)

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 70 pages, numbered from 1 to 70, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$11.60; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 2nd day of March, A. D. 1932.

(Seal)

WALTER B. MALING,

Clerk United States District Court for the  
Northern District of California. [71]

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA

To the Southern Pacific Company, and to H. C.

Booth and A. G. Goodrich, its attorneys, greeting:

YOU ARE HEREBY CITED AND ADMON-  
ISHED to be and appear at a United States Cir-  
cuit Court of Appeals for the Ninth Circuit, to be  
holden at the City of San Francisco, in the State  
of California, within thirty days from the date  
hereof, pursuant to an order allowing an appeal, of  
record in the Clerk's Office of the United States  
District Court for the Northern District of Cali-  
fornia, Southern Division, wherein the United  
States of America is appellant and the Southern  
Pacific Company is appellee, to show cause, if any  
there be, why judgment rendered against the said  
plaintiff herein and appellant in said appeal men-  
tioned should not be corrected and why speedy jus-  
tice should not be done to the parties in that behalf.

WITNESS, the Honorable Frank H. Norcross, Uni-  
ted States District Judge for the Northern District  
of California this 26th day of December, A. D. 1931.

FRANK H. NORCROSS,

United States District Judge for the Northern  
District of California, Southern Division. [72]

[Endorsed]: Filed Dec. 31, 1931.

Received copy of within Citation on Appeal, this  
31st day of December, 1931.

A. G. GOODRICH,  
Of Attorneys for Appellee. [72]

[Endorsed]: No. 6771. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 3, 1932.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court  
of Appeals for the Ninth Circuit.



No. 6771

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IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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THE UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
VS.	
SOUTHERN PACIFIC COMPANY,	
<i>Appellee.</i>	}

---

Appeal from the District Court of the United States for  
the Northern District of California,  
Southern Division.

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**BRIEF AND ARGUMENT FOR APPELLANT.**

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**FILED**

**APR 30 1932**

GEO. J. HATFIELD,

United States Attorney,

L. E. KILKENNY,

Assistant United States Attorney,

JAMES O. TOLBERT,

Special Assistant to

United States Attorney,

*Attorneys for Appellant.*

AUL P. O'BRIEN,

CLERK



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\*Copies of the unreported opinion have been filed with the clerk of this court.



No. 6771.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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THE UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
VS.	
SOUTHERN PACIFIC COMPANY,	
<i>Appellee.</i>	}

---

Appeal from the District Court of the United States for  
the Northern District of California,  
Southern Division.

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## BRIEF AND ARGUMENT FOR APPELLANT.

### A.

#### STATEMENT OF THE CASE.

This case involves five alleged violations of the Safety Appliance Acts, Title 45, U. S. Code, Chapter 1, Sections 1 to 9, and an Order of the Interstate Commerce Commission issued pursuant to Section 9 of the said chapter, which order reads as follows:

“IT IS ORDERED, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Acts as amended March 2, 1903, any train is operated with power or train brakes, not less



than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

On November 10, 11, 12 and 13, 1930, appellee made five transfer movements of cars between the Mission Bay unit and the Sixth Street unit of defendant's general yard at San Francisco, these transfers consisting of ten, twenty-six, twenty, eight and thirteen cars, respectively, exclusive of locomotive and tender. In each instance the air brakes on the cars were not under the control of the engineman, due to the air hose between the locomotive and cars being disconnected (Tr. pp. 24, 43-45).

On the plat used at the trial of this case and made a part of the record the Mission Bay unit is marked "A" and the Sixth Street unit is marked "B"; the green line shows the track connecting these two units which was used in making the five transfers here under consideration. The track shown by the green line is what is known in railroad parlance as a "drill" track, over which switch engines operate between "A" and "B", and is also used when necessary to switch cars into either "A" or "B". This track is not used by road trains.

The distance between "A" and "B" is approximately 4,000 feet (Tr. p. 25), on the green line, and when to that is added the distance traveled before

reaching the green line or after leaving it, the distance traveled by these transfers was something over a mile (Tr. p. 43). In making the trips between "A" and "B" eight public streets are crossed at grade (Tr. pp. 25, 46), five or six of which are protected by crossing watchmen during daylight hours (Tr. pp. 25, 43).

In none of the five transfer movements was any car picked up or set out en route, and in each instance the transfer moved as a unit, the switching necessary in making up or breaking up of these transfers being done before the movements began or after their completion. Two of the five movements were made by the locomotives pushing the cars. All of the movements were made wholly within yard limits, by yard engines and yard crews and under the direction of the yardmaster (Tr. pp. 25, 56).

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## B.

### ASSIGNMENT OF ERRORS.

#### I.

The Court erred in overruling plaintiff's objections to the following question asked of the witness Hopkins by counsel for defendant and in permitting said witness to reply thereto, to which action of the Court plaintiff then and there duly excepted:

"Q. Will you state from your experience as an operating man, and your observation of the

operation here complained of, whether the handling of drags of cars, as you have described them, on the green line without coupling air, and as described by the two witnesses for the plaintiff, is a safe or unsafe operation?

A. I would consider moving at the slow speed that we have to move in this territory between the two units, that the measure of safety would be greater without air through the cars than it would be with air."

Assignment of Errors II to XI, both inclusive, relate to the refusal of the Court to enter judgment in favor of the Government and in entering judgment in favor of the defendant in each of the five causes of action.

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### C.

#### QUESTION INVOLVED.

The sole question involved in this case is whether the five transfer movements were train movements within the meaning of the power-brake provisions of the Safety Appliance Acts, or whether they were mere switching movements.

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### D.

#### ARGUMENT.

In this brief the last ten assignments of error will be considered as a whole for they all relate to the

same question as to each cause of action, and will be taken up first. The first assignment of error having to do with the admission of certain testimony will be dealt with last.

## I.

**THE MOVEMENT IN THIS CASE WAS A TRAIN MOVEMENT AND CONSEQUENTLY THE FAILURE TO USE AIR BRAKES ON CARS WAS A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT.**

There is no serious dispute as to the facts, the whole case hinging upon whether the movements were train movements or mere switching movements. If they were train movements, the law was violated; if they were mere switching movements, the law was not violated. As construed by the various courts the air brake provisions of the law apply to transfer trains as well as road trains. In the instant case the transfer movements were from one distinct point in appellee's yard in San Francisco where there were numerous tracks and switches, over a single lead track, to another distinct point where there were also numerous tracks and switches. Between these two points no switching was done, but before the movements began and after their completion, the cars were switched to various tracks. What was done in either "A" or "B" is not involved herein, this case being based solely on the movement of these strings of cars between "A" and "B" for a distance of approximately a mile, during which not a single car was switched out of or switched into the strings of cars (Tr. pp. 42-45).



Among the early decisions on the question of the application of the air brake law to transfer trains is that of *U. S. v. Erie R. Co.*, 237 U. S. 402, wherein transfer movements of cars in charge of switching crews were made by switching locomotives from one yard to another for a distance of 2 to 3½ miles, over main line track. The Supreme Court in holding that such movements were train movements said:

“It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision.”

While the *Erie* case just cited differs from the case at bar in that the movement was for a greater distance and some main track was used, it is similar to the instant case in that there was no picking up or setting out of cars en route, such work having been done before the movements began and after their completion.



The Supreme Court again considered this question in *Louisville & Jeffersonville B. Co. v. U. S.*, 249 U. S. 534, which involved a transfer movement of a locomotive and 26 cars for a distance of three-quarters of a mile, a part of which was over main line track for delivery to another carrier. The Court said:

“An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a ‘train of cars,’ but would certainly be so designated by men in general and in any fair acceptance of the term must be regarded as constituting a train within the meaning of the statute. It was a train greater in length than most regularly scheduled trains were when the Safety Appliance Act was passed twenty-six years ago, and even yet, probably exceeds in length, passenger and freight trains considered, more than a majority of the regular road trains in this country.

*The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it can not, therefore, with propriety be called a switching movement.”*

In the case at bar the movements were not a “sorting, or selecting, or classifying” of cars involving coupling and uncoupling, but was the transfer of cuts

of cars as a unit from "A" to "B" for a distance of about a mile without uncoupling, coupling or switching out a single car.

This question again came before the Supreme Court in *U. S. v. Northern Pac. Co.*, 254 U. S. 251. This case was based on transfer movements for a distance of 4 miles without the required percentage of air brakes in operation. The contention was made by the defendant that the provisions of the Safety Appliance Acts did not apply because the movements were not over a part of a main line; that neither passenger nor freight trains, through or local, moved over that part of the track and that the movements were not controlled by time tables, train orders, or time cards. On the other hand, it was contended that the rules required all trains to move at such speed that they could be stopped at vision and that all trains were under the control of the yardmaster's orders. In passing on that case the Supreme Court used the following language:

"\* \* \* If use of the road as part of a main line were essential in order that operations on it be controlled by the Safety Appliance Act, the requirement would be satisfied in this case by the fact that two independent companies use the road for freight trains under air control and that the passenger trains of another company cross it. 'Not only were these (the defendant's) trains subject to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check

or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect.' *United States v. Chicago, Etc., Ry., supra.* *But there is nothing in the Act which limits the application of the provision here in question to operations on main-line tracks.* The requirements that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to 'all trains \* \* \* used on any railroad engaged in interstate commerce.' It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are 'trains' within the meaning of the Act. *A moving locomotive with cars attached is without the provision of the Act only when it is not a train; as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains.'*

The Circuit Court of Appeals for the Eighth Circuit also passed upon the question in the case of *Great Northern v. U. S.* (C. C. A. 8th), 288 Fed. 190. The facts are clearly set forth in the opinion and are quoted below:

"Within the general terminal yards of plaintiff in error at Minneapolis there are a number of apparently smaller yards or units designated as 'P' yard, 'O' yard, 'M' yard, 'N' yard, and others. According to the testimony of the train master of the Terminals Division, St. Paul to Hutchinson, each of these yards is a separate unit. The twenty-four cars here involved had been bunched on

Track No. 6 in the 'P' yard. They were pushed by an engine from this point to a point west of Lyndale Avenue Bridge known as the 'Hay' yard north of the main tracks. To reach this place they moved east from the 'P' yard; crossed the east line main track to the west line main track, and proceeded east on this track to the lead at the 'Hay' yard where the cars were distributed to certain industries and delivery tracks. The distance moved was about 4,800 feet and the movement was continuous from the 'P' yard to the 'Hay' yard. It was not a mere switching operation, but was a transfer movement of twenty-four cars from one distinct entity known as 'P' yard to another entity known as the 'Hay' yard."

In holding that this was a train movement and not a mere switching operation, this Court said:

"The switching, as distinguished from train movement, was after the cars had reached the 'Hay' yard, or lead track there. In moving the cars down the main track they were exposed to hazards themselves and exposed other trains operating on the main line to hazards which made essential the appliances for quickly stopping, and such is the very purpose of the Act. *The mere fact that the Railroad Company designates a large stretch or track as yard does not make every operation therein a switching operation. If so, the Act could be avoided by including large areas in the term yard.* These cars, so operated, constituted a train within the purview of Section 8605, U. S. Statutes, and under the Order of the Inter-



state Commerce Commission made in pursuance of the Statutes eighty-five per cent of such train must be so equipped with power or train brakes that the engineer can control the speed without requiring brakemen to use the common hand brakes. This train was not so equipped, and the case falls within the doctrines announced in *U. S. v. Erie R. R. Co.*, 237 U. S. 402; *U. S. v. C. B. & Q. R. R. Co.*, 237 U. S. 410; *U. S. v. Northern Pac. Ry. Co.*, 254 U. S. 251; *Louisville & Jeffersonville Bridge Co. v. U. S.*, 249 U. S. 534; *U. S. v. Galveston, H. & H. R. Co.*, 255 Fed. 755."

While the subdivisions of the general yard at Minneapolis were given specific designations they were as much a part of the general yard as "A" and "B" are in the instant case.

In *Illinois Central R. Co. v. U. S.* (C. C. A. 8th), 14 F. (2) 747, the Circuit Court of Appeals for the Eighth Circuit had occasion to pass upon the question in a case almost identical with the one at bar. In that case there were two subdivisions within defendant's Grace Street yard, Omaha, located 4,500 feet apart and connected by a running track as in the instant case. The 18 cars were assembled in one of the subdivisions and pushed to the freight house where the cars were set out for unloading. The running track over which these cars were moved was never used for regular scheduled trains, and was used wholly for movements similar to the one involved in that case. The defendant maintained that this was a movement



wholly within the Grace Street yard, that they did not recognize any subdivision within that yard, and that the movement was merely a switching movement and not subject to the air-brake provisions of the Safety Appliance Acts. The Court in deciding the case used the following language:

“Applying these authorities to the case at bar, we are persuaded that this movement was essentially a train movement. The first switching operation had been completed. The remaining cars were reassembled and passed as a unit along a single track for a considerable distance. No switching operations were undertaken until another set of switching tracks was reached. The streets of a busy city and tracks of other railroads were crossed at grade, and there was ever present the probability that the train might, at any time, have to be stopped suddenly to avoid an accident. This could not be done without the use of train brakes. There was a serious danger not only to the crew of this particular train, but to the public as well, which it was the object of the law to minimize as far as possible.

The fact that the whole operation was within what the railroad chose to call and operate as one yard is not controlling. As we have already shown, the so-called Grace Street yard was divided into two sets of switching tracks, a considerable distance apart, and connected by a single lead track, from which the public was not excluded. This part of the yard, at least, was used by other railroads, and was not the private property of the plaintiff in error.”

The same Circuit Court of Appeals had occasion to pass on this question again in a case involving almost the identical facts, and held that the movements referred to therein were train movements (*Chicago St. P. M. & O. v. U. S.* (C. C. A. 8th), 36 F. (2) 670).

In *Chicago & E. R. Co. v. U. S.* (C. C. A. 7th), 22 F. (2) 729, decided by the Circuit Court of Appeals for the Seventh Circuit, a train had arrived in the yard, was broken up and the cars distributed, when 28 cars remained for movement to another section of the yard, referred to as Section C, for further switching. These 28 cars then moved over main line track for 1,500 feet and then an additional 2,850 feet after entering Section C. The movement of these 28 cars was held to constitute a train movement requiring the use of power brakes.

In *Great Northern Ry. Co. v. U. S.*, decided by this Court and reported in 297 Fed. 692, the carrier operated a transfer at Wenatchee, Wash., without the required percentage of power brakes. The railroad yard at Wenatchee consists of two portions referred to as the west or Old yard and the east or Apple yard, connected by a main track and a westbound lead or switching lead used for switching cars back and forth between the two portions of the yard. This switching lead was also used for moving westbound through freight trains. The east or Apple yard was used for making up freight trains, and the west or Old yard was used for switching to various industries located

adjacent thereto and for storing and icing cars. There is also an industry track known as the alley track over which various industries are served. The six cars making up the transfer train were taken out of a freight train in the east or Apple yard and hauled by a "switch" engine with a "switch" foreman and "switching" crew and proceeded over the westbound lead track to the Old or west yard, 8,000 feet distant. In making this movement the train entered the east yard and proceeded to the freight depot, some 1,500 feet from the east entrance of the west yard where a freight car was set out; the locomotive and remaining five cars proceeded about 3,600 feet westerly from the freight depot and set out another car on a spur track; the locomotive and remaining four cars then proceeded to the west yard where another car was set out; the locomotive and remaining cars then proceeded eastwardly over the switching lead, connecting the east and west yards, to a junction of the lead track with the alley track and back down the alley track to a point where another car was set out, after which the movement continued east and another car set out. In making this movement the main line track was crossed three times and some public streets were crossed at grade.

The carrier contended that the movements between the two yards were governed by yard rules and that it was necessary to switch many of the cars from one to five or more times, and that unless great expedition

was used, injury to the shipping public would follow. The Court said :

“Applied to the facts in the present case, the rule of the decisions cited lead us to hold that the Railway Company was not moving cars about in a yard or on tracks set apart for switching operations at Wenatchee, but moved the train between two yards over a considerable stretch of main line, and that unless the engineer could readily and quickly check or control the movements of the trains they were exposed to hazards which the statute covered, and they also became a danger to the safety of other trains which the statute was equally designed to protect.”

In *U. S. v. Northern Pacific Railway* (C. C. A. 9th), 54 F. (2) 573, decided by this Court on December 18, 1931, the facts as set forth in the Court’s opinion and its conclusions thereon are as follows:

“\* \* \* The alleged violation described in the first count of the complaint occurred as follows: A switch engine was coupled head on to a string of five cars, which had been left standing on the side tracks in the vicinity of the depot, and pushed these cars out easterly onto the main line track. It proceeded along the main line track for a distance of somewhat over one-half mile. There it shunted four of the cars onto a switch or spur at what is called Wilson’s Mill. The engine backed out with one car and proceeded a distance of a few hundred feet to another siding, which it backed into with the single car to allow a regular train to pass on the main line. It then proceeded



with the one car southeasterly along the main track for a distance of slightly over one mile, where it set out on a spur the single car, and took two loaded oil cars for a return trip. It stopped at the Wilson spur and there switched the four cars previously left by it to spurs at as many different industrial establishments in the immediate neighborhood of the Wilson spur. It then returned to the depot yards along the main line track with the two loaded oil cars.

The outgoing and return movements, ending at the depot yards, are the subject of the first count. Similar movements on the day following are made the subject of the second count. During the movements described, none of the brakes on the cars were connected with power under the control of the engineer.

The track over which the movements were executed crossed several city streets used by pedestrians and vehicles. For at least one-third of a mile, the main line used ran through the center of Wishkah Street, which was the main highway for automobile traffic between Tacoma and Hoquiam.

We are of the opinion that the movements complained of were train movements and subject to the requirements of the Safety Appliance Acts. They were in no sense switching movements within the railroad yards where trains were assembled or broken up. As was said by Justice Brandeis, in *United States v. Northern Pacific Ry. Co.*, 254 U. S. 251:

‘A moving locomotive with cars attached is without the provision of the act only when it is



not a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains.'

In the transfer of cars from railroad yards to nearby points or to other yards of a railroad company, where the main line is traversed for substantial distances, the railroad company is not authorized to claim that the movement is merely one of switching which will fall without the provisions of the act."

In the court below the carrier made much of the fact that the "drill" track over which the questioned movements were made was used for switching purposes and was not used at all for road trains. It is the Government's contention that the character of the track used has no bearing on whether a given movement is a train movement or a switching movement, and that the sole test is *what was done during the particular movement in question*. This contention is supported by the Supreme Court in the *Northern Pacific* case, *supra*. It is quite conceivable that there may be a switching movement on a main line track, where, for example, it should become necessary to break up or make up a train on such track. Manifestly if there was a movement of cars which in every other respect would constitute a train movement, and such cars should move over a track set aside for switching, it could not be said that the mere fact that the movement was made over such tracks would change the character of the movement from a train

movement to a switching movement. There is no indication in the Safety Appliance Acts that Congress intended to limit the application of the air brake law to main line movements.

It can not be too emphatically stated that the character of the track has no bearing on the question; switching may be done over a main line no less than over a switching track or lead; and vice versa a train movement may be made over a switching lead as over any other kind of track.

Where there is a continuous movement of cars as a unit for a mile or more without any cars being switched in or out during the course of such movement, it is submitted that such operation constitutes a train movement, irrespective of the character of the track, designation of crew or locomotive, or the rules under which movement is made.

In *U. S. v. Northern Pac. Co.*, No. 12213, unreported, decided by Judge Neterer for the Western District of Washington on December 1, 1928, the question involved was whether strings of 10 to 17 cars, hauled approximately a mile and a half along the waterfront of Seattle were train movements or switching movements. In holding that these were train movements, Judge Neterer said:

“The distinction between ‘train movements’ and ‘switching’ is not whether it involves the use of the main line of defendant or other companies. There may be train movements on a spur track. Switching precedes or follows train movements. A switch

is a movable part of a rail or of opposite rail for transferring cars from one track to another. A train is a continuous or connected line of cars on a railroad. *D. C. Ry. Co. v. Mills*, 48 N. W. 1007. An engine with cars attached, pushed on a railroad track, is a train. *Dacey v. Old Col. R. Co.*, 26 N. E. 437. The only purpose of these citations is to confirm elementary definitions.

It is apparent, I think, from the record, that the units formed by assembling and coupling together of the engine and cars at Second Avenue and transporting 14 cars to the middle yard is a complete transaction as fully as though the movement had extended to a more distant point. The unit was not broken up. No cars were out from or added to the unit en route. The switching operations in making up the unit before the movement or afterwards had no relation to the movement of the engine and connected line of cars over the railroad to its destination, and this has application to the movements in the several causes of action. Pier 8 to middle yard, 18 cars, is a greater distance and a longer train than Second Avenue to middle yard, 14 cars, as is also middle yard to Pier 5, 17 cars, but the relation of the act of transportation is not different.

For many purposes the entire switching ground of the defendant may be considered as one yard, and the designation of the different yards merely a matter of convenience to the defendant; but when a completed unit is formed at one yard and transported in its entirety to another point over the streets, highways, and railways a mile or more distant, it takes on a different relation; and since

the statute makes no exception the courts must follow the plain terms of its provisions, and as said by the Circuit Court of Appeals in *Great Northern Ry. v. United States*, 297 Fed. 692, the court must follow the letter and spirit of the statute. The fact that the defendant has by careful operations avoided casualties inspires commendation but does not exempt it from the act."

Summarizing the holdings of the cases cited, it clearly appears that the following principles have been definitely and clearly established by the courts:

1. There is nothing in the Federal Safety Appliance Act which limits its application to operations on main line tracks.

The character of the track, whether main line or otherwise, is not controlling.

*U. S. v. North. Pac. Co.*, 254 U. S. 251;

*Illinois Cent. R. v. U. S.* (C. C. A. 8th), 14 F. (2d) 747;

*Chicago & E. R. Co. v. U. S.* (C. C. A. 7th), 22 F. (2d) 729;

*Chicago St. P. M. & O. v. U. S.* (C. C. A. 8th), 36 F. (2d) 670;

*U. S. v. Northern Pac. Co.* (C. C. A. 9th), 54 F. (2d) 573.

Switching may be done on a main line; and there may be train movements on spur tracks.

*U. S. v. North. Pac. Co.*, No. 12213, unreported.

2. A movement for a considerable distance of a number of cars as a unit without uncoupling or



switching out a single car and which movement is not a sorting, or selecting or a classifying of the cars is not a switching movement.

*Louisville & J. Br. v. U. S.*, 249 U. S. 534.

3. The fact that an assemblage of cars is transferred by an operation at vision without time tables or block signals, with a switching engine, and a yard crew does not make such transfer a switching movement.

*U. S. v. Northern Pac. Co.*, 254 U. S. 251;

*Chicago, St. P. M. & O. v. U. S.* (C. C. A. 8th),  
36 F. (2d) 670;

*Illinois Cent. R. v. U. S.* (C. C. A. 8th), 14 F.  
(2d) 747;

*Chicago & E. R. Co. v. U. S.* (C. C. A. 7th), 22  
F. (2d) 729.

4. The mere fact that a railroad company designates a large stretch or tract as a *yard* does not make every operation thereon a switching operation.

Movements of cars between parts of the same yard, as a unit, no cars being set out or picked up, switching and classifying being done before starting from one part of the yard or <sup>After</sup> arrival at another part, is a train movement and not a switching movement.

*Great Northern v. U. S.* (C. C. A. 8th), 288  
Fed. 190;

*Chicago, St. P. M. & O. v. U. S.* (C. C. A. 8th),  
36 F. (2d) 670;



*Illinois Cent. R. v. U. S.* (C. C. A. 8th), 14 F. (2d) 747;

*Chicago & E. R. Co. v. U. S.* (C. C. A. 7th), 22 F. (2d) 729.

5. The controlling test of the statute's application lies in the *essential nature of the work done* rather than in the names applied to those engaged in it.

*U. S. v. C. B. & Q. R. Co.*, 237 U. S. 410.

While the Southern Pacific Company, for operating reasons, has chosen to include the San Francisco terminals in one yard under the control of one general yardmaster (Tr. p. 73), it is apparent that the network of tracks at the points marked "A" and "B" on the plat were subdivisions within the general yard connected by a single running track over which these transfers moved. A reference to the plat makes it difficult to arrive at any other conclusion than that there is a distinct yard at "A" and another one at "B".

In any event, whether or not there is one or more yards at San Francisco is immaterial, for the sole question is whether the movements complained of were trains or mere switching operations. To make the application of the law depend upon whether the movement was wholly within the yard would place in the hands of the carrier the power to restrict the application of the law by further extending the boundaries of their yard.

In the case of *U. S. v. C. B. & Q.*, 237 U. S. 410, the Supreme Court, in passing upon another case involving the air brake law, said that:

*“the controlling test of the statute’s application lies in the essential nature of the work performed rather than the names applied to those engaged in it.”*

It seems obvious that the movements here under discussion, which were made as a unit from one distinct point to another for a distance of over a mile, are train movements irrespective of what the carrier chooses to designate them for operating purposes.

These transfer movements crossed at grade several streets which were used by various kinds of traffic. Having in mind that the purpose of the Safety Appliance Acts is to promote safety to employees and the traveling public, it is hard to imagine a situation where it is more necessary that the enginemen have such control of these transfer movements as to bring them to a stop in order to avoid accidents. This is a busy yard and safety demands that the trains be so equipped as to make it possible for enginemen to bring them to a stop in the least possible space of time and distance.

## II.

THE LOWER COURT ERRED IN ADMITTING TESTIMONY AS  
TO RELATIVE SAFETY IN OPERATING THE TRANSFER  
MOVEMENT WITH OR WITHOUT USE OF AIR BRAKES ON  
THE CARS.

With respect to the first assignment of error relating to the admission of testimony as to the greater degree of safety in operating these transfer movements without the use of air brakes than with such use, the Supreme Court, in the *Louisville & Jeffersonville Bridge* case, *supra*, said, page 539:

“\* \* \* But the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act.”

In the same connection that court also said, in the *Northern Pacific* case, *supra*, 254 U. S. 251, 255:

“\* \* \* Congress has not imposed upon courts applying the Act any duty to weigh the dangers

incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented."

From the foregoing citations it is evident that the admission of the testimony objected to was clearly inadmissible, and it was therefore error to permit the question to be answered. In addition the introduction of such testimony tends to becloud the issue and should for that reason have been excluded.

While not a part of the record, it is a circumstance of which this Court might well take judicial notice that on certain occasions San Francisco is enveloped in a dense fog that makes all kinds of traffic hazardous, particularly railroading. In *U. S. v. Chicago, B. & Q. Ry.*, 237 U. S. 410, 412, the Court said:

"\* \* \* And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect."

Irrespective of what some particular witnesses might say to the contrary, it requires no stretch of the imagination to see that a transfer movement of, say, 20 cars can be brought to a stop more readily and easily with the power brakes in use on every vehicle in the transfer than can be done with the brakes applied on the head end only, for such limited appli-

cation would in case of emergency allow the cars behind to continue onward and bump into the locomotive, and thus prolong the retardation of the speed of the entire train or unit. To argue otherwise is akin to saying that the motorist is as safe with 2-wheel brakes as with 4-wheel brakes. It is not an exaggeration to say that many conditions might arise where the variation of the stopping time of a transfer movement might mean the difference between safety or a serious accident. All of the cars involved were equipped with air brakes and all that would have been required to have all of the air brakes under the control of the engineer was to couple the air hose between the various cars and the locomotive.

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#### CONCLUSION.

Wherefore, it is respectfully submitted that the judgment should be reversed.

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No. 6771

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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THE UNITED STATES OF AMERICA,  
*Appellant,*

VS.

SOUTHERN PACIFIC COMPANY,  
*Appellee.*

---

Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

BRIEF AND ARGUMENT FOR APPELLEE.

---

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## BRIEF AND ARGUMENT FOR APPELLEE.

---

### I.

#### *Statement of the Case.*

The statement of the case in Appellant's Brief is a bare outline of the pleadings and evidence.

As suits for penalties under the Safety Appliance Acts depend to so great an extent on the facts peculiar to the individual case we shall state the facts more fully under appropriate divisions of the Argument hereinafter made.

The case was tried before Hon. Frank H. Norcross, United States District Judge, sitting without a jury. He filed a written opinion (Rec. pp. 24 et seq.) in which he summarized the evidence, pointed out that each case of this character must be decided on its peculiar facts, analyzed the Supreme Court and other Federal Court decisions relied on by the plaintiff and concluded "that 'the essential nature' of the movements in question was switching and not train movements". Judgment for defendant was accordingly ordered and entered.

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## II.

### *Question Involved.*

The sole question involved is whether the trial court was correct in coming to the conclusion next above quoted from his written opinion.

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## III.

### *Argument.*

While the facts may appear somewhat involved to one unfamiliar with railroad operation in general and that of the defendant's San Francisco Yard in particular, they may be divided for clearer understanding and for separate discussion and application into two main groups:

- (1) The “essential nature of the work done,” the manner of doing which is complained of; and
- (2) The evidence as it bears on the comparative safety, in the circumstances, of the work done.

Other points not requiring a discussion of the facts are separately treated.

The only intermediate error specifically assigned will be discussed in Subdivision 5 of this chapter.

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### ***1. “The Essential Nature of the Work Done” Shows That the Movements Were Not Train Movements.***

The only movements complained of were over the track shown in green on Plaintiff’s Exhibit No. 1, a copy of which we append to this brief.

That track was not a main line track, nor used for that purpose. It was a “drill” track used for switching operations and for connecting two units of the yard used for distinct purposes. The “movement of cars” (complained of in each count) was “on a line which has no other connections except with switching tracks and which line in purpose and reality is but an extension of such switching tracks” (Trial Court’s Opinion, Rec. p. 30).

Although no cars were set out of a drag or picked up by it during the time it was on the green track it is clear that each movement over that track was merely part of a

unitary movement, the sole purpose of which was to switch, assemble or classify cars.

Therefore, as found by the trial court (Rec. p. 32) “‘the essential nature’ of the movements in question was switching and not train movements”.

Thus, while plaintiff’s Inspector Engles testified as to the beginning and end of each movement on the green track, he did not tell, because, as he said, he did not know, what became of the cars when the unit left the “green track”. It is apparent from his testimony that as a part of and at the end of the movements that entered both areas the unit in each case was distributed and placed on different tracks (Rec. pp. 42, 43, 44, 45). *It is also apparent that that was done by the same locomotive and was an essential part of a continuous switching operation that was in part only over the green track.* It is certain that none of the movements in question was of a drag that came from the Bay Shore area of the yard where freight trains are made up and broken up (Rec. p. 53), although some of those drags from the Bay Shore go into Area “A” as well as Area “B” (Rec. p. 55). We say this, first, because “the track that the so-called Bay Shore drag uses is not the same as this switching drag was operated on that the complaint refers to” (Rec. p. 55), i. e., the green track; and, second, because Trainmaster Hopkins testified without contradiction (Rec. p. 64):

“The air is coupled on all drags between all units of the San Francisco yard and Bay Shore;



they use the main line from a point near Sixteenth Street to Bay Shore; there is a filled-in trestle across the channel.”

An inspection of the map (Plaintiff’s Exhibit No. 1), a copy of the relevant portion of which follows this brief under the same cover, will do more to fix in one’s mind the physical facts of the portion of the San Francisco yard where the movements occurred than several pages of explanation. Probably the reader of this brief can best orient himself by the Southern Pacific passenger station at Third and Townsend Streets, which is shown on the map and so marked, and by the red line on the map which represents a part of the double track main line over which Southern Pacific passenger trains arrive at and depart from that station. The area marked “B” which is grid-ironed with parallel tracks and extends southwesterly from the passenger station is described by Trainmaster Hopkins as follows (Rec. p. 55):

“The green track is what I refer to as the drill track. The lines shown on Exhibit No. 1 that connect with the green track and northeast of it, through blocks 130, 132, 134, etc., are industry tracks; they are strictly industrial tracks, spurs, for the purpose of serving industries with cars and taking cars away after they are loaded; they are in no sense main line tracks. Except for the banana train, none are made up in the area shown on this map.”

He further testified (Rec. p. 62):

“Now, as to the area marked ‘B’, that is used for other purposes. The territory in ‘B’ is more of a freight shed territory, and other industries, of course, that are reached in that territory, as well as the tracks that are known as 47 and 48, which are used as an assembly track; in other words, cars in this territory, as they are taken out, are thrown over there, and as they assemble into a suitable drag they are taken to Mission Bay for movement and connections, or to Bay Shore for train movement. Taking a typical case for illustration: Suppose a drag of twenty cars comes from Bay Shore and goes through Tunnel No. 2 and Tunnel No. 1 and leaves the main line track just south of Barstow Street; it does not touch the green line track coming from Bay Shore; then supposing, in that drag of twenty cars, we have some of them that are to be taken across San Francisco Bay by the car ferry, and some of them that are going to the Santa Fe, and some of them that are going to these sheds E, F, and G, shown in the area marked ‘B’, that drag of twenty cars would be segregated in the area marked ‘A’ and the cars that went to the Santa Fe would be transferred to it, and those that were to go up to the area marked ‘B’ would be taken to it over the green line. Now, taking a typical drag of cars moving from ‘B’ to ‘A’ over the green line; they might consist of several different classes of cars, some to go across the bay on the car ferry, some to be transferred to the Santa Fe, and some to the Western Pacific, and some to the Belt Line. The reason for taking them there is that that is the

segregating point for San Francisco cars; it would not be possible to do the segregating at the area marked 'B'."

Area "A", as to some extent explained in the quotation next above, is devoted to somewhat different uses than Area "B". It will be seen that it is connected with the remainder of the yard by several tracks—one of which is the green track,—that it adjoins warehouses, and that track connections are afforded from it to the Santa Fe railway yards, the Santa Fe freight slip, the freight slips of the Southern Pacific, as well as the "Belt Line"—the State owned terminal railroad that serves the piers shown on the map and also the industries that have spurs springing from the Belt Line.

Area "A" was described by Trainmaster Hopkins (Rec. p. 60):

"The area of tracks used by the railroad and marked 'A', is for assembling cars from industrial sections, transfers, and from boats arriving in Mission Bay slip into drags, where they are taken to Bay Shore and segregated for train movement. There are three different units in that system of tracks in the area marked 'A'. There is what we call the Elliott yard, there is the hay yard, and there is the Mission Bay unit. These units are all in the Mission Bay area. There are also industrial tracks in the district down in the vicinity of the channel. In addition to that, there is a system of team tracks in what is known as the hay

yard. That is all reached from this point here—that is an extension of the green line. These tracks are also used for preparing cars for special commodities, such as for sugar. They are also used for cars to be transferred to the Atchison, Topeka & Santa Fe Railroad; the segregation is made at that point. The extension of the Santa Fe tracks, where their switching is done, is shown on the map, just west of Piers 48 and 50; it goes on down. Their particular yard is in China Basin. All cars received from the Santa Fe, and also from the Western Pacific, and also from Southern Pacific boats through the point shown as S. P. Ferry Slip, are segregated into drags in this Mission Bay area, and hauled in solid drags to the Belt Line Transfer. That includes cars that arrive through those agencies that are delivered all the way from Townsend Street to Fort Mason. Fort Mason is not shown on this map; it is north of the portion shown as Union Ferry Station.”

He further described Area “A” by saying (Rec. p. 62):

“The railroad term ‘classification’ as applied to freight *cars* [yards] is that portion of the yard that is used for segregating cars to units for different train movements, for delivery to other carriers, and with boat connections, and rail connections. I would say that it would be very proper to call the area marked ‘A’ a classification unit or area.”

Thus it is clear that areas “A” and “B” are not,—as is stressed in some of the cases hereinafter discussed,—sepa-



rate and distinct "yards". Each area has its different uses appropriate to its location, distinct from the other area and necessary to a complete "yard" at a terminal such as San Francisco.

Now, as to the green track and its uses.

Trainmaster Hopkins, concurred in by General Yardmaster Selden (Rec. p. 73) characterized the green track as a drill track, saying (Rec. p. 55) that there are three drill tracks paralleling the main (red) track, and that

"What I mean by a drill track, is a track that is used for switching purposes, drilling back and forth, and from which spur tracks and industries are taken off; that is, to be distinguished from the main line track; that is, an inside track that is independent of the main line track entirely, and on which no movements of main line travel are made. The track shown in green in Exhibit No. 1 is the connection between the area marked 'A' and the area marked 'B'; that was also true in November, 1930, and also before and since then; it was not used as a main line track in whole or in part; it is entirely separate and distinct from the main line track. The green track is what I refer to as the drill track."

He further said (Rec. p. 63):

"As to the necessity or convenience to go upon any main line track in going from 'A' to 'B', or from 'B' to 'A', there is no point that you can go from this drill track to the main track, except



through the connection which is in the vicinity of Sixteenth Street; it is shown in a black line, just about east of Block 32. There is no connection between King Street and Sixteenth Street, between this drill or any of the drills and the main tracks. By 'this drill,' I refer to the green line as shown on Plaintiff's Exhibit No. 1, for the reason that *there is another drill track between this green line,—that is shown in the black line on this Exhibit—and the red line, which is the track that is used by Bay Shore drags going direct from Sixth Street to Bay Shore.*" (Note: air is always coupled in those drags; Rec. p. 64.)

It is also beyond question in this case that the green drill track is customarily used for switching purposes, and is not merely a connection between "A" and "B".

As to its use for switching purposes, Trainmaster Hopkins said (Rec. pp. 56-58):

"As to the use of the west end of this green line for switching purposes, that is, the end nearest Sixth Street, that is a territory that serves the freight sheds; in addition to that, it serves industries that reach down as far as Third and Berry Streets, Third and Channel, which can be identified as the Southern Pacific Terminal Building. In the territory between that and Sixth Street, there are several spurs serving lumber yards, rock bunkers, and sundry industries in the territory. This green line is used by engines in switching for the sheds, and in making what we would call a double freight movement, doubling from

one track to another. On drags of thirty cars, the engine would be approximately half of the distance on the straight green line between 'B' and 'A'. That would be about between Irwin and Hubbell. In the reverse direction, an engine switching or doubling a long drag in the part marked as 'A',—if it were possible for the two of them to be working on that lead at the same time, the engines would almost come together on the green line; it is a single track lead there. There are three tracks in there; the No. 2 lead is next to the main track; the No. 3 lead is the lead that is used to Mission Bay; No. 4 is a drill lead off which these spurs lead that you asked me about a few minutes ago; that is only used as an emergency lead; this is a single track lead in the movements that are referred to. In November, 1930, prior thereto and since, the green line tracks have customarily been used in these switching operations that I have been describing; for a period of years there has been no change in the movements there.

When I speak of doubling over,—I mean by that, taking a drag of twenty cars, that ten cars might be on one track and ten on another in the area marked 'B'; in other words, the engine has to pull maybe ten cars off one track and pull them out a sufficient distance to get over the switch and throw the switch, and then back up on the others to complete the drag."

He further said on cross-examination (Rec. p. 68):

"It is a fact that all of the movement of cars from the area that is marked 'A' to and from the

area marked 'B' are made over the green track, but that track is also used as a switching lead to both 'A' and 'B'. As to what I mean by a 'switching lead': A drag that is being switched in the portion shown as 'A', or Mission Bay, with a number of cars, will be half way down this track between 'A' and 'B' in a switching movement or moving from one track in 'A' to another track in 'A', in making a move. What I mean by that is this: We will pull, say thirty cars out of 'A' from probably different tracks, or probably make a straight move from one track in 'A' to another track in 'A'. In making that move, the engine will be half way down the same track in a straight line between 'A' and 'B' in order to make the move. In making a similar move in 'B' the same condition would exist; that is, a car movement may be made out of 'A' onto that track shown in green, the locomotive proceeding about half way, and then these cars may be backed into the area 'A' again onto another track; and a like movement may be made in the area 'B'. There is a parallel track to the green track that has spur track connecting, but not with the green track."

The use of the green track is further summarized by Trainmaster Hopkins on page 70:

"Cars are moved in drags, or transfers, or whatever they may be called, from the area marked 'B' to the area marked 'A', for the purpose of segregation into drags at Mission Bay area for delivery to connecting lines, and for movement from Mission Bay to Bay Shore for

train movement, as well as for delivery to industries in the Mission Bay area, or vice versa.

Cars moving in the reverse direction, that is from 'A' to 'B', are cars that are brought in in drags from Bay Shore and Mission Bay, *segregated for delivery to industries or sheds; also cars received from connecting lines through the transfer, as well as by boat from Oakland and Sausalito.*"

It is clear that *any movement over the green track was merely part of a switching, classification, assembling or breaking up movement* and the trial court in effect so found.

The engines specified in the complaint were switch engines, used for no other purpose. The drags were not scheduled time table movements nor made under the direction of a train dispatcher nor handled by road crews, the crews that handled them being yard crews (Rec. p. 56). They were not furnished with cabooses nor did they carry markers—either lanterns or flags (Rec. pp. 49-50).

We respectfully submit that the facts show that the movements in question were not "train" movements as that term has been explained in the decisions of the federal courts, the relevant ones of which are succinctly analyzed in the opinion of the learned trial judge (Rec. pp. 24-32).

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## ***2. Comparative Safety of the Movements Com- plained of.***

We are somewhat at a loss to understand the theory of counsel for the appellant with respect to the safety features of the case. They assign error “relating to the admission of testimony as to the greater degree of safety in operating these transfer movements without the use of air brakes than with such use” (Appellant’s Brief, p. 24)—which we discuss later in this brief, then immediately invoke the judicial notice of this court “that on certain occasions San Francisco is enveloped in a dense fog that makes all kind of traffic hazardous, particularly railroading”, and close their brief (Appellant’s Brief, pp. 25-26) with a discussion of the relative lengths of time within which a drag of cars can be stopped with power brakes or with engine brakes alone, concluding the argument with the statement:

“All of the cars involved were equipped with air brakes and all that would have been required to have all of the air brakes under control of the engineer was to couple the air hose between the various cars and the locomotive.”

The last quoted statement is somewhat obscure. In order to have power brakes operative throughout the entire length of a cut or drag of cars it is necessary that the hose be coupled not only between the engine and the front end of the head car, but also between the rear end of that car and the head end of the car immediately



behind it, and so on throughout the length of the collective unit, and then close the angle cock on the rear end of the rear car to prevent the escape of the compressed air through the entire drag. Such connections are made by hand—not automatically as is the case with car couplers—and that is one of the main reasons why courts have exempted switching movements, movements in making up and breaking up trains, etc., from the power brake provisions of the act.

At the trial counsel for appellant were careful to prove that certain streets were crossed at grade and the extent of the protection given by human flagmen (Rec. p. 43), as well as the hours the flagmen were on duty (Rec. p. 46). On this appeal, however, they argue, citing *Louisville & Jeffersonville Bridge Company v. United States*, 249 U. S. 534, 63 L. ed. 757, that, to use the language of the Supreme Court in that case:

“But the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law, and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply, and that failure to comply will not be excused by carefulness to avoid the danger which the

appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act."

As an abstract statement of law the quotation would commend itself even without the supreme authority of the court that uttered it. But it comes at the end of a detailed discussion of the operation there condemned, all to the point, as stated by the Supreme Court at the end of the discussion, that "these suggestions serve to emphasize the dangerous character of the movement". So it will be found in almost every case cited by counsel or appearing in the books wherein a given operation has been held to have required the coupling of air hose and the operative condition of the power brake. Those discussions have not been to justify the existence of the act; its justification under the police power of the nation and the Commerce Clause was judicially settled soon after its enactment. Rather have those discussions been in an effort to determine from the surrounding circumstances whether the movement under consideration was that of a *train* as Congress used that word, and in an effort to apply to the case considered the rule laid down in *United States v. Chicago, B. & Q. R. Co.*, 237 U. S. 410, 413, 59 L. ed. 1023, 1027, approved in the *Louisville & Jeffersonville Bridge* case, *supra*, that:

"\* \* \* the controlling test of the statute's application lies in the essential nature of the work done."

It is more convenient and more expeditious for a yard crew in handling two or more cars in a switch drag or in a movement incident to the making up or breaking up of trains or the spotting of cars on spur tracks for unloading, or at industry or warehouse platforms for the same purpose, to do so without coupling the air, a process which necessitates manual coupling (connecting) of the air hose between all of the cars at the time the drag is made up and manual uncoupling and re-coupling to afford a continuous air line each time the drag is broken and a car set out of or added to the collective unit. It is also true that operation of drags without coupling the air hose is less expensive. Counsel intimate (p. 26) that it is not. Their intimation is "off the record", so that we feel free to say that unnecessary coupling of air creates an added and locatable out-of-pocket wage expense in addition to that incident to delay. As to that we have something to say in the next subdivision of this chapter, but the element of hazard involved in operating a drag of cars without coupling the air in a territory where the hazard of collision is ever present or unusually frequent is often—and properly so—a determining factor in the railroad operating officials' instructions to yard crews on the subject. The incentive is not theoretical. If an accident occurs which results in personal injury to or death of an employee and is fairly attributable to disobedience of the Safety Appliance Acts by the employer, the financial penalty is far more severe than that for a violation of the act itself. Section 7 (U. S. Code, Title 45, sec. 7) provides that:

“Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.”

Then, too, the effect on a railroad defendant where in an action for damages such as a grade-crossing case a violation of the Safety Appliance Acts is proven to have been a contributing cause, no matter how slight, is too well known and too serious to require more than its mere mention here.

So that, while switching operations may legally be carried on without coupling the air and for some distance on a genuine main line, provided they are true switching operations, and while true “making up” or “breaking up” operations may be similarly carried on without coupling the air, it is not considered good railroad practice so to do where other tracks are available; and while a “train”, within the meaning of the Safety Appliance Acts, may be operated on a non-main line track, such is not the practice.

It has naturally followed that in all or almost all of the reported cases the courts have taken into consideration the hazard, and particularly the main line movement, involved, not as controlling the decision,



but as in large measure determining what the Supreme Court has described as “the essential nature of the work done.”

It is therefore entirely legitimate in the instant case to call attention to the lack of hazard in the challenged operations over the green line shown on Plaintiff's Exhibit No. 1, not because the character or extent of hazard controls the case itself but because the hazard or comparative lack of hazard in an operation is a strong indication of and one of the prime factors in determining “the essential nature of the work done”. The courts have evidently and properly assumed that railroad operators and their legal advisors from selfish as well as humanitarian motives try to observe both the spirit and the letter of the law in classifying operations that are not distinctly and unquestionably, regular “train” operations.

In the preceding subdivision we summarized the testimony as to the reason for and essential character of the movements; we will now abstract that relating to any hazard inherent therein or incident thereto. The instant case is freer from such hazard than any of the reported cases.

The route traversed was over the “drill track” (Rec. p. 55) shown in green on Plaintiff's Exhibit No. 1 (copy appended hereto). That track is “not used as a main line track in whole or in part; it is entirely separate and distinct from the main line track” (Rec. p. 55) which is shown in red on that exhibit. The



tracks shown as connecting with the green track "are in no sense main line tracks" (Rec. p. 55). The streets crossed by the green track at grade are for the most part in the category of "paper streets" so far as arterial use is concerned. Inspector Engles described them (Rec. pp. 43, 44, 45) but did not go into details concerning them. Trainmaster Hopkins said of them (Rec. pp. 58-60):

"As to the form of crossing watchman protection at the main streets, beginning at Sixth Street: At Sixth Street, ordinarily, the engine in starting from that territory would be south of Sixth Street proper; after leaving Sixth Street the first crossing that is made from between the freight sheds is Berry Street; at this point there is a crossing watchman between seven A. M. and six P. M. The next open street is Hooper Street; there is no protection at that crossing. The travel on Hooper Street is negligible; the same applies to Irwin, Hubbell and Daggett; the company maintains crossing watchmen at Irwin and *Hubbell* (later, p. 67, corrected to "Hooper") Streets, but not at Daggett. Barstow comes into Sixteenth Street and is not across the tracks. There is a flagman for twenty-four-hour periods at Sixteenth Street. Continuing around, you again cross Sixteenth Street at the mouth of Mission Bay, where there is a twenty-four-hour watchman service.

As to the character of the travel on Irwin, Hubbell, and Daggett Streets, as shown on Plaintiff's Exhibit No. 1: In the morning, probably from seven to nine, there will be a few truck movements

reaching industries that are in the territory served by the spur tracks shown on this map. Again, there will be infrequent movement over these tracks throughout the day.

The viaduct over Sixteenth Street is shown with approximate correctness on Plaintiff's Exhibit No. 1. That viaduct was built through a franchise arrangement; am not sure of the year, but I think it was around 1914. It was made to direct the traffic away from the grade crossing on Sixteenth Street, which is continuously blocked by our engines in switching Mission Bay; we block Sixteenth Street as much as thirty minutes to an hour at a time. That is the street with the greatest volume of traffic in that neighborhood. Berry Street in the early morning is a heavy traveled street and is busy. There is nothing to prevent the driver of trucks or other vehicles from using this viaduct when the crossing is blocked, or if they fear they might collide with or be collided by some locomotive or string of cars. The reason they do not use it is that the grade is pretty stiff on the approach; also trucks use it, also pleasure automobiles. The ones that do not want to use it just have to wait until the crossing is unblocked."

And again (Rec. pp. 61-62, 63):

"The traffic at night is practically nothing. It is very, very infrequent on all of them, including Sixteenth Street; that is, Sixteenth Street after nine o'clock at night, and on Berry Street after six o'clock at night.

“As to the physical condition of these grade street crossings and the ability of drivers and pedestrians to see an approaching train on the green line, they are wide open crossings; there is no obstruction of the view.”

“This green line does not cross any street car tracks, nor any main line railroad tracks of this or any other railroad.”

As to the actual handling of the drags Inspector Engels' testimony was:

The movement on November 10 was about a mile, the locomotive hauling ten cars; air hose were not coupled (Rec. p. 55); the movement was from Area “B” on the exhibit to Area “A” (Rec. p. 43). The movement on November 11th was from Area “B” to Area “A”, 26 cars, no air coupled (Rec. pp. 43-44) and for about a mile. The movement on that day was at not more than three miles per hour (Cross Ex., Rec. pp. 46-7) although later he said (Cross Ex., Rec. p. 47) speaking of all the movements:

“The engineers would stop these movements with the locomotive and tender brakes. Whether or not it would be a difficult matter to stop a train at a speed of five or six miles an hour on a level track with those brakes would depend on circumstances. I would say that these transfers were operated between five and ten miles an hour. I would not say exactly five miles an hour; they may have exceeded that, or they may not, in some instances.”

The movement on November 12th was from Area "B" to Area "A", with 20 cars, the engine pushing them; no air hose connected. The movement on November 13th (Rec. p. 45) was of 8 cars from Area "A" to Area "B"; no air hose coupled. Another movement on November 13th was of 13 cars from Area "B" to Area "A"; they were pushed ahead of the locomotive without coupling air hose (Rec. p. 45). He further said (Rec. p. 47):

"The type of the locomotives used is what is classified as a switch engine; that is an engine that is customarily used by the Southern Pacific and other railroads in handling cars for the making up and breaking up of trains, called the classification of cars, and the spotting of cars at industry locations, and the taking away of cars from industries. They are equipped a little differently from the so-called road engine which is sent out with a freight or passenger train after that train has been made up; the constructions may be a little different; they are not entirely used as road engines. Still, I have seen a great many road engines used in switching service, engines that were really road engines. When these engines were used in switching service, they were generally equipped as a switch engine, with safety appliance standards."

The testimony of plaintiff's Inspector Engels was amplified by defendant's witness Trainmaster Hopkins, whose qualifications are given at page 52 of the Record.



Trainmaster Hopkins said (Rec. p. 58):

“I heard Mr. Engels’ testimony about how these transfers could be handled with braking power if there were no air brakes coupled up. I do not agree with that testimony. The crew are required by rule to be distributed over the tops of these cars to manually control them by hand brake, if necessary. Ordinarily, the brakes on the engine could handle a drag such as has been described here, running from eight to twenty-six cars, at the speed at which they were operated. The best proof that they could be handled is that they have been handled that way to my knowledge for twenty-five years, without accident.”

In his redirect examination he said (Rec. pp. 69-70):

“The rule under the heading ‘With Caution’, on page 8 of the Southern Pacific Rules and Regulations of the Transportation Department, reads as follows:

‘To run at reduced speed according to conditions, prepared to stop short of a train, engine, car, misplaced switch, derailling rail or other obstruction, or before reaching a stop signal; where circumstances require, train must be preceded by a flagman.’ ”

We have elsewhere said, and we desire again to emphasize in this discussion of the safety features of the case as throwing light on and being one of the reliable criteria of “the essential nature of the work done”, that the operations over the green track described by



the witnesses and here challenged as violations of the Safety Appliance Acts were carried on precisely as they had been carried on for many years.

But, to operate drags without air was not the practice throughout the San Francisco yard in cases where the statute if fairly applied to a particular operation would require air hose to be coupled in that operation. Turning again to Plaintiff's Exhibit No. 1 and the explanatory testimony we find that the main passage from and to the metropolitan portion of the San Francisco yard, within which lie areas "A" and "B", is through a series of tunnels which begins with Tunnel No. 1 as located on the exhibit. Trainmaster Hopkins said (Rec. p. 61):

"Passenger trains coming in and going out of San Francisco from the Third and Townsend Street station use the red line main track entirely. The passenger yard extends from Seventh Street to Third, and are an entirely separate set of tracks from those cited in the complaint; we do not use that for freight purposes. The only freight movement that is made over there is that a drag that is coming in from either Mission Bay unit or the Bay Shore unit going to Sixteenth Street territory pulls down through the interlocking plant and backs out Townsend Street."

The San Francisco yard includes more than the area shown on Plaintiff's Exhibit 1. Mr. Hopkins said (Rec. pp. 53-54):

"Plaintiff's Exhibit No. 1 does not show all of the San Francisco yard. That yard extends south

from Tunnel No. 1 to San Bruno, including the San Bruno station, and what is known as the old main track via Valencia Street, which includes sidings, at Burnell, Ocean View, Colma, and other spur tracks in that territory, including an area or district known as Bay Shore; that was also the case November 10 to 13, 1930. With the exception of the banana train on Friday night, the usual and ordinary practice of the Southern Pacific Company is to make up and break up freight trains carrying freight southbound from San Francisco, or northbound into San Francisco, at Bay Shore. The banana train is made up in the Mission Bay unit and leaves from that unit. This was also the practice in November, 1930, and prior thereto. There is one general yardmaster, Mr. J. G. Selden, [*Note: A witness who corroborated Mr. Hopkins' testimony; Rec. pp. 73-4-5*] who had at that time, and still has, jurisdiction over the San Francisco yard. He has yardmasters and assistant yardmasters in the various units of yards.

The distance from Tunnel No. 1 to Bay Shore, where these trains are made up and broken up is 4.1 miles. Neither before November, 1930, nor then, nor since then, have road freight trains come into San Francisco as road freight trains. As to how the freight trains which go to make up these road freight trains are taken out of San Francisco toward Bay Shore, and taken from Bay Shore into San Francisco: they are moved in by what is termed a yard drag, a drag service between the two units of the yard; that extends to Mission Bay, Sixth Street, the Belt Line Transfer, the Sixteenth Street industrial territory, and

other industrial territory around the San Francisco terminal. [Note: Air is always coupled on those drags, Rec. p. 24.] Referring to Plaintiff's Exhibit No. 1, the Belt Line transfer starts at Second Street and runs toward the Ferry Building. It is shown down here opposite Block 264 and down through that way. It is directly to the south, you might say, of Block 264. The tracks are parallel; the short tracks are spurs. Block 264 is just west of Pier No. 30; it runs from there in a westerly direction up to the point that would be approximately opposite Pier 40.

*These drags, as they come into the portion of the San Francisco yard north of Tunnel No. 1, and as they go out through Tunnel No. 1, are coupled with air; they use the main track entirely from San Francisco Tunnel No. 1 to Bay Shore. These drags enter and leave the main track at the area shown as 'A', approximately just west of where Barstow Street is shown; you will notice there is a connection there that goes right through and goes into the main track, indicated by a black line; that is the connection from what we call the switching drill into the main track; they enter and leave the main track through that point."*

Further, Mr. Hopkins said (Rec. p. 67):

"Referring to the move of drags of cars to and from Bay Shore when air was used: We have in that service two types of engines, one known as a consolidation type or a road engine that has been converted to a switch engine by removing the pilots and applying foot boards; in that type of

locomotive the speed on the main track is thirty-five miles an hour. On the switch type it is twenty miles an hour. Twenty miles an hour on the main track is the company's limitations on the speed of these switch engines. Where the engine is pulling a move on the green line shown on Plaintiff's Exhibit No. 1 over this drill track, the speed will average between six and eight miles an hour; when the engine is shoving the cars ahead of it the speed will average between four and five miles an hour. The drags that are moved on the main line to and from Bay Shore will average two or three times as many cars as drags on the drill track."

Thus, the uncontradicted testimony shows that while it would be possible legally to conduct switching, and other operations which the courts have held do not require control by power brakes, upon the double track main line which is shown in red on the exhibit and its continuance southerly through the series of tunnels to the Bay Shore unit of the San Francisco yard, such operations are not conducted on that stretch of track without air hose being coupled and the power brake operative. The reason is not entirely that the red tracks and their prolongation are main line tracks, although it is apparent that that is an important factor. Other reasons are the greater length of the Bay Shore drags (Rec. p. 68), greater speed maintained by the drags in which the air is coupled (Rec. p. 68) as compared with the drags operated over the green line, the greater congestion of traffic on the red



line and its extension through the tunnels, the use of the red track for through passenger trains, and the exclusive use of the green line as a drill track for switching and distributing cars and making up and breaking up trains; in short, that the operation of a string of cars—by whatever name called—on the red track and through the series of tunnels without air being coupled would be contrary to the spirit, if not the letter, of the law.

Appellant's counsel seem unconsciously to feel that the factor of safety is involved in this as in every case arising under the air brake section of the Safety Appliance Act; while explicitly disclaiming such an issue they introduced evidence as to grade crossing protection that could have no relevancy other than to that subject, and conclude Division I (p. 23) and Division II (pp. 25-26) of their brief with arguments that the facts in the case at bar present a situation of unusual hazard.

May we be permitted again to say that our discussion of the evidence in our case bearing on safety is not an attempt to induce this court to set up its own standards of safety in train operation and thereby determine the defendant's guilt or innocence, but is in the belief that in this, as in practically all other reported cases under the Air Brake section of the Safety Appliances Acts, the presence or lack of extraordinary hazard is a strong indication of the "essential nature of the work done".



***3. While Expense of Compliance Is Not per se a Defense to a Police Regulation, It Is One of the Criteria In Determining the Reasonableness of a Construction Thereof.***

While the trial court declined to hear evidence as to the additional cost of the additional coupling service required to operate "drags" of cars with air brakes fully operative therein (Rec. p. 65), there is nevertheless a general consideration of expense this court may judicially notice and which should be given weight in a case where the very best that can be said for plaintiff's construction is that it presents a doubtful or "border line" situation.

The effect of the construction contended for by appellant would not be confined to the San Francisco Yard of the Southern Pacific Company. The practice complained of is standard at every important terminal on our railroad system where like track arrangements exist. Air hose must be coupled by hand; they do not couple automatically. It is obvious that to couple and uncouple air hose when a drag is made up or broken up or a car cut out or put in, slows yard operation. It requires men to reach between the cars to couple and uncouple the air hose and there is an element of danger as well as delay in that manual operation. In analogous circumstances danger is expressly recognized by Congress in the Safety car-coupler section of the Safety Appliance Acts (U. S. Code, Title 45, Sec. 2). Those are the two principal

reasons why the courts have held that Congress did not mean to include the switching and other car movements that have been excepted by various Supreme Court decisions. Otherwise the courts would have clung to "the dictionary definition of 'a train of cars' " (*Louisville and Jeffersonville Bridge Case*, 249 U. S. 534, 63 L. ed. 757), as the Safety Appliance Act uses the word "train" without qualification. But the same case (page 540) holds that it is the "essential nature of the *work* done" that is determinative—not the name given by a yard official or a Bureau inspector to the collective unit of locomotive and cars.

Passing the question of safety, which is claimed to be improper for us to argue here, the obvious fact remains that in the aggregate on a large railroad system the additional cost of air-hose coupling neither legally required nor—in the judgment of the railroad officials—required for safety, would be very large.

That is a sound objection to the laying down of a rule in a quasi-criminal proceeding which is not clearly within the spirit as well as the letter of the safety statute. The objection is not controlling, but it is ponderable.

The Transportation Act of 1920 (U. S. Code, Title 49, Sec. 15a) enjoins on the carriers economical management of their transportation facilities. Mr. Justice Brandeis said of that provision and its cognate clauses (*Davis v. Farmers Co-operative Co.*, 262 U. S. 312, 67 L. ed. 996):

“Avoidance of waste in interstate transportation as well as maintenance of service has become a direct concern of the public.”

This court is asked by appellant to place a construction on the Safety Appliance Act that will result in widespread additional and, as we believe, unnecessary expense—an expense so obvious as to require no proof and to be within that judicial notice that declines to close the eyes of the court to ordinary and every-day practices and their necessary results.

True it is that added expense, or “uncompensated obedience” (232 U. S. 548) is not a defense *per se* to a police-power statute otherwise valid.

But we are here asked to submit an administrative construction of a statute which hitherto has not been, as to the San Francisco yard or other yards in like situation, insisted upon by the body to whom such enforcement is delegated. And when that construction is insisted upon we may well bring up the matter of an expense which is obvious and which hitherto we have not been required to bear; we are justified in urging that as one of the reasons why the construction sought by the appellant should not be placed on the yard operations involved in the case at bar.

The defense of unreasonableness is always available in a civil action or criminal proceeding to enforce a police-power statute, however definite the terms of the statute may be. It is similarly available when an un-

reasonably broad construction is sought to be given to the statute. Expense of compliance is always one, though only one, of the criteria of reasonableness.

It was said by Mr. Chief Justice Hughes in the recent *Los Angeles Depot Case* (*Atchison etc. Ry. v. Railroad Commission of California*, 283 U. S. 380, May 18, 1931), on pages 394 and 395, concerning the police power of the state to “require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them”:

“But the power to regulate is not unlimited. ‘It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.’ (citing cases) The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. (citing cases) And ‘*the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order*’ (citing cases.)” (Italics ours.)

In the *Los Angeles Depot Case* the order to build a depot was not attacked under the Commerce Clause but under the Fourteenth Amendment (283 U. S., opening sentence to “Third”, p. 394).

The need for economy—efficiency and safety, of course, being paramount—is not idly urged by us. The deplorable state of the railroads in 1931, which progressively and substantially has grown worse since that time, was judicially noticed by the Supreme Court



in the *Grain Rate Case (Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 284 U. S. 248, January 4, 1932), in which the change of conditions that has brought that about is emphasized (p. 260) by Mr. Chief Justice Hughes, speaking for the entire court, as the “contemporary fact, dominating thought and action throughout the country”.

The considerations we dwell upon in this branch of our brief cannot be lightly disposed of by appellant’s counsel by concluding (p. 26) that but little time would have been required to have coupled the air hose. The *de minimis* maxim has no application here. It begs the question which on this branch of the case is whether the court, in a case, which at the best for the plaintiff is far from clear, should compel a practice which if applied to thousands of similar operations during the course of the year would obviously create a large expense. That expense is “an important criterion to be taken into view in determining the reasonableness” of the extent to which the national police power is claimed to be applicable to the facts in this case and closely similar cases.

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#### ***4. The Leading Cases, Fairly Considered, Show That the Movements on the “Green Track” Were Not Train Movements.***

We first question the accuracy of the frequent and persistent use by appellant’s counsel of the expressions “transfer movements” and “transfers” to de-



scribe the "essential nature of the work done", which is "the controlling test of the statute's application" (*Louisville and Jeffersonville Bridge Co. v. U. S.*, 249 U. S. 534, on p. 540; 63 L. ed. 757, 2nd col., p. 759).

The expressions are misleading if by their use it is intended to convey the thought that the movements were not of a class which the Supreme Court has held not to be "train" movements.

In a broad sense, every movement of a car from one position of rest to another is a "transfer movement" regardless of purpose, designation or motive power. The car is "transferred" when it is moving in a through or local freight train under load and bill of lading, when it is being hauled to a spur or side track for loading or unloading, or when, alone or with other cars, it is being placed in or taken out of a train. But in none of those senses do counsel use the term; they try to identify the movements in question with the movement of "transfer *trains*" as that expression is applied to the facts summarized in several of the reported cases where the facts differed materially from those in the instant case.

Our contention is, and the trial court substantially held, that the movements were distinctly of the excepted classes in the mind of the Supreme Court when it said in *United States v. Northern Pacific*, 254 U. S. 251, that "a moving locomotive with cars attached is without the provision of the Act only when it is not a train *as where* the operation is that of switching, classi-

fyng and assembling within railroad yards for the purpose of making up trains". Under familiar rules of construction the words that follow "as where" are to be taken as merely illustrative, not as exclusive. If the court had said "*only* as where" the definition would undoubtedly exclude any operations except those of "switching, classifying and assembling cars within railroad yards for the purpose of *making up* trains". Such was not the Supreme Court's intention because trains must be "broken up" as well as "made up", and to *break up* a train, cars must be switched and classified and disassembled; there are, also, other operations than the mere actual breaking up and making up of trains that are of the same character and for the same general purpose as switching, classifying and assembling cars, and consequently such operations are not within the prohibition of the Act.

We welcome the citation of *U. S. v. Erie R. R. Co.*, 237 U. S. 402, 59 L. ed. 1019, because it definitely supports our contention. Said the court (our italics):

"It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which has been assembled and coupled together for a *run or trip along the road*. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. *But it is otherwise* with the various movements in railroad

yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements but *mere switching operations*, and so are not within the air-brake provision."

Counsel for appellant print the same excerpt on page 6 of their brief in the case at bar. While the court held in the *Erie* case that the movements were train and not switching movements, it is important to note from the court's statement of facts that the trains were "made up in yards like other trains"—which is not our case,—“proceeded to their destinations over main line tracks used by other freight trains both through and local”—which is again not our case; further that the Erie trains “were not moving cars about in a yard or upon tracks set apart for switching operations, but were engaged in *main line transportation*”—an essentially different state of facts from that in the case at bar. The court then proceeded to discuss the element of hazard to which we advert elsewhere in this brief.

The chief point of similarity between the case at bar and the *Erie* case, *supra*, is thought by counsel for appellant (p. 6) to be that in neither case were cars set out between the time the engine coupled on to the string of cars and its leaving them and proceeding to other work. That was not controlling there and, as we shall show is not here.

Let us briefly examine the facts in the *Erie Case*: There the movements in question were between three independent yards, one of which was in Jersey City. In that yard there were sixty tracks, in the Weehawken yard eighty tracks, and in the Bergen yard one hundred and fifteen tracks. The yards were independent of each other and were connected by double main line tracks used by other through and local trains. They were in actual practice treated as separate yards. Trains had to pass through a dark tunnel over switches leading to other tracks and across passenger tracks whereon trains were frequently moved. No cars were switched out of the transfers at any time because the transfers moved for delivery from one yard to the other; they were separate and unitary operations. Each yard was a regular station at which freight, both local and interstate, was accepted and delivered, as shown in the Erie's tariffs.

Companion to the *Erie Case* in principle and authority is the *Burlington, or Kansas City Case* (*U. S. v. C. B. and Q. Ry.*, 237 U. S. 410; 59 L. ed. 1019). There the movement was within Kansas City, and between two freight yards, on opposite sides of the Missouri River over a main line track connecting them, which was a track by which passenger and freight trains entered and left the city. Each train was moved as a unit from one yard to the other and not infrequently was both followed and preceded by other trains, passenger and freight. The distance be-



tween the two yards in the city was about two miles and the trains passed over a single track bridge a distance of three thousand feet, intersecting at grade twelve or fifteen tracks of other companies and passing through the union depot company's tracks. The trains in Kansas City usually consisted of an engine and thirty-five cars, moving as a unit over a considerable stretch of main line track which was a busy thoroughfare for passenger and interstate traffic. That was clearly a "run or trip along the road".

Counsel then rely on the case of *Louisville and Jeffersonville Bridge Co. v. United States*, 249 U. S. 534, 63 L. ed. 757, which concludes by saying that "the controlling test of the statutes application lies in the essential nature of the work done". They lift from the opinion and isolate the language quoted on page 7 of their brief without applying the statement of facts that precedes the discussion by the court as to whether the movement was a train movement.

In the *Bridge Company Case* which related to a movement in the City of Louisville, the trip consisted in moving a train with an engine and twenty-six cars from a large terminal yard of Louisville & Jeffersonville Bridge Company, constituting the joint terminal of the Big Four and Chesapeake & Ohio systems of railway, over a main line track to a track of the Illinois Central Railroad Company, used as a main line by both the Big Four railroad and the Chesapeake



& Ohio railroad, at a speed of fifteen miles an hour over four city streets at grade and stopping them on a main track; then, reversing the engine, the train was moved over the track of the Chesapeake & Ohio over three city streets and stopped. Again reversing, the train was moved over three city streets on the main line track of Chesapeake & Ohio and then into the Illinois Central yard where the cars were delivered. The delivery of a train of cars in such circumstances from the yards of one company to the yard of another over tracks used by three other companies was without a doubt a train movement and is clearly distinguishable from the movement involved in this case.

We feel impelled to remark that on the facts of that case the Supreme Court was asked to adopt as strained a construction of the act in favor of the bridge company as this court is asked to adopt on the facts in the instant case against the Southern Pacific Company. The difference between the two cases is not only marked by the fact, as stated by the court and accented by appellant's counsel, that the movement in the *Bridge Case* was "a transfer of the twenty-six cars as a unit from one terminal *into that of another company for delivery*, without uncoupling or switching out a single car", but also in the use of main lines as described in the statement of facts, and in the extraordinary and unusual hazard, apparent from the facts and commented on by the court following counsel's quotation; all of those considerations marked the case as one clearly within the spirit of the act and present-

ing all of the hazards the act was intended to minimize.

In the *Northern Pacific or Duluth Transfer case* (U. S. v. *Northern Pacific*, 254 U. S. 251) there were two movements: one with an engine and forty cars, and the other an engine and forty-eight cars, the one being the reverse of the other. In the first movement the train started from the Furnace yard of eleven tracks, passed through the Berwind yard and the Boston yard to the Rice's Point yard, a distance of about four miles. In making the movement it was necessary to use tracks over which passenger and other trains of three other lines were hauled, the Duluth South Shore & Atlantic, the Soo Line, and the Duluth & Transfer Railway, besides other trains of the Northern Pacific Company itself. The railway lines of the Duluth, Winnipeg & Pacific and the Duluth, Missabe & Northern, and the Minneapolis, St. Paul and Sault Ste. Marie were crossed in addition to the crossing of highways and street car tracks. The particular track used was also used for hauling trains hauling logs of the Duluth & Terminal Railway and the trains of Duluth, Missabe & Northern containing coal and lime. The trains were taken as a unit from the Furnace yard to the Rice's Point yard and delivered, being placed on tracks for the purpose of being switched by other engines. Again there is an almost complete lack of factual analogy between the cited case and the case at bar.

In the *Minneapolis or Great Northern Case* (Great Northern Ry. v. U. S., 288 Fed. 190) an examination of the record and briefs shows a very marked distinction between that case and this case. There were several yards involved,—the “O” and “P” and “Hay” yards. Twenty-four cars were moved from track six in the “P” yard past the “O” yard to a point where the train entered upon one of the four main lines several hundred feet west of the Lyndale Avenue Bridge. Proceeding easterly it was moved along and over main track No. 4 until it reached a cross-over between main tracks Nos. 3 and 4 just westerly of that bridge, then across over to and on main track No. 3 for a short distance under the bridge, then by another cross-over reached main track No. 2 just east of the bridge and proceeded along that track for three or four hundred feet. It then crossed over to main track No. 1 where it moved for about 200 feet until it reached the lead switch into the Hay yard. At this point thirteen cars were set out on main track No. 1 and the other eleven cars were placed in the Hay yard. *The carrier’s testimony in that case was specific that those yards were separate and distinct; that the movement was a delivery from the “P” yard to the “Hay” yard, and that it was not made for the purpose of reaching any industry.* There were no cars picked up or set out en-route and no placing of cars to industries. There were different leads to each of the yards. The “P” yard from which the train moved was used for the purpose of getting cars together for different transfers to dif-

ferent units of various yards of the company in Minneapolis. The transfers were brought in to the yards by the Minneapolis & St. Louis Railway transfer, the Minneapolis Eastern, the Chicago, St. Paul, Minneapolis & Omaha, the Northern Pacific, and the Northfield & Southern. The yardmaster testified that transfer trains were moved from the "Hay" yards down to the "P" yards. *The movement was against the current of traffic on the westbound main line.*

Appellant cites the most recent air-brake case in this circuit, that of *United States v. Northern Pacific Railway* (December 18, 1931, C. C. A. Ninth Circuit) 54 Fed. (2d) 573. The citation is helpful to appellee as a contrast to the operation involved in the case at bar. The appellee Northern Pacific Railway was not held guilty of violation of the statute except for a movement of five cars from side tracks in the vicinity of the depot and a return movement with two loaded oil cars along the same route to the depot yard. The movement condemned was on the main line for a distance of somewhat over half a mile, crossed several city streets used by pedestrians and vehicles and "for at least one-third of a mile the main line used ran through the center of Wishkah Street, which was the main highway for automobile traffic between Tacoma and Hoquiam." The exhibit map shows that on these blocks of that stretch were tracks jointly operated by three railroad companies. This court, speaking through District Judge James, concludes by saying (page 574):



“In the transfer of cars from railroad yards to nearby points, or to other yards of a railroad company, where the main line is traversed for substantial distances, the railroad company is not authorized to claim that the movement is merely one of switching, which will fall without the provisions of the act. *United States v. Erie Railroad Company*, 237 U. S. 402, 35 S. Ct. 621, 59 L. ed. 1019; *Great Northern Railway Co. v. United States*, 297 F. 692 (C. C. A. 9). The authorities cited, we think, fully sustain the conclusion before stated. It is proper to state, if what has been said in this opinion is not already clear to the point, that we do not intend to hold that during the actual switching operations, at either of the places where cars were left or picked up, power brakes were required to be connected between the engine and cars; nor that the use of the main line for switching or assembling trains, within the railroad yards, would bring such movements within the statute provisions.”

Neither the statement of facts nor the conclusion in that case in any way impairs our defense here.

Practically all of the cases referred to in Appellant's Brief in support of their contention that the movements complained of were train movements were cited to the trial judge. He first listed them on page 26 of his opinion as printed in the transcript of record and then proceeded to show that they do not control the case at bar because the facts in each of them differ from those peculiar to the movements in the San



Francisco yard. We refer to the analyses thereof made by the trial judge, calling particular attention to the importance he gave the fact that the green track shown on Exhibit A was a track "in fact set apart for switching operations" (Rec. p. 29) and to his statement on page 30 (*italics ours*):

"In the *Northern Pacific case* (254 U. S. 251) the Supreme Court said:

'A moving locomotive with cars attached is without the provisions of the act only when it is not a train; as where 'the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains.'

From this it does not necessarily follow that a movement of cars as in the case at bar is a train within the meaning of the statute where such movement *is on a line which has no other connections except with switching tracks and which line in purpose and reality is but an extension of such switching tracks.*

In the *Great Northern case* (288 Fed. 190) the court said:

'The mere fact that the Railroad Company designates a large stretch or tract as yard does not make every operation therein a switching operation. If so, the act could be avoided by including large areas in the term yard.'

The two portions of the yard, designated units in the case at bar, present quite a different situation than is presented in the *Great Northern case* (288 Fed. 190). *The question whether it be a*

*train or a switching movement must be determined by the peculiar facts of each case. If the entire movement is within a designated yard that is a fact to be considered with other pertinent facts. As said in the Illinois Central case (14 Fed. (2d) 747):*

*‘The decisions turn upon the particular facts of each case. All of them contain many varying and conflicting factors, no one of which alone is controlling.’ ”*

In the *Wenatchee case*, referred to by appellant’s counsel (*Great Northern v. United States*, 297 Fed. 693; C. C. A. 9th Circuit), two strings of cars were first assembled and then moved from one yard, Apple-yard, over a track used for moving westbound through freight trains over it, to another yard, the old yard, a distance of 8000 feet.

*“An outstanding material fact is that, after the cars were assembled in the eastern yard the engine and six cars were operated as a unit over lines used by all through freight trains, and the unit crossed over the main line used by all passenger trains and across several city streets. In its entirety the movements involved operations on tracks not set apart for switching operations, and we must conclude that they were train movements, rather than switching operations.”*

After referring to the *Erie* and *Burlington Cases* the court said:

“Applied to the facts in the present case, the rule of the decisions cited leads us to hold that the railway company *was not moving cars about in a yard or on tracks set apart for switching operations at Wenatchee, but moved the train between two yards over a considerable stretch of main line*, and unless the engineers could readily and quickly check or control the movements of the trains they were exposed to hazards which the statute covered, and they also became a danger to the safety of other trains which the statute was equally designed to protect.”

Appellant’s counsel also cite *Chicago & Erie Railroad Co. v. United States* (C. C. A. 7th), 22 Fed. (2d) 729. In that case, after reviewing the standard decisions, the court said (*italics ours*):

“Possibly no exact rule can be laid down by which it can, in all cases, be determined whether there is a train movement or a mere switching operation. In this case, whether the three sections constituted one yard or three yards, we think, is immaterial. We have here these facts:

After the west-bound train in question came to Section B of the Huntington yard, and the train had been broken up and distribution of cars made pursuant to instructions, 28 cars remained in section B of said yard for movement to and further switching in section C. The switch engine was attached to the 28 cars and ‘moved from the north (or west) end of section B of the defendant’s yard out onto its west-bound main track,

used by its through freight and passenger trains, and northward (or westward) along said main track for a distance of 1,500 feet, at which point it entered section C of defendant's yard and continued northward (or westward) over its switching lead and No. 10 track, a distance of approximately 2,850 feet'.

That westbound track was 'the only track connecting section B with section C of the Huntington . . . The air hose between the tender of the locomotive and the first car were not coupled . . . No stops were made for the purpose of setting out, picking up or otherwise switching the cars . . . After the train . . . arrived at the point in section C of said yard designated as F on Exhibit 3, the crew proceeded, without delay, to classify and deliver the 28 cars on the various tracks of section C.'

In addition to a number of freight and passenger trains 'there are from 35 to 40 movements of engines and cabooses, pusher engines or engines with cars attached each 24 hours, in both directions, on the westbound track,' over which the movements in question were made. There were numerous street crossings and a railroad crossing at grade, over which numerous trains passed daily. An engine and 28 cars would make a train approximately 1,000 feet long."

The difference in the facts between the case just cited and the instant case is so obvious as to require no further comment.



Appellant's counsel further cite *Chicago, St. P., M. & O. Ry. Co. v. United States* (C. C. A. 8th), 36 Fed. (2d) 670. There the facts were:

“Sixteen cars were assembled on what is known as the Burlington exchange track, located in what the railroad terms the south part of its yards in Omaha. These 16 cars were moved, as a unit, by a locomotive of the railroad commonly used for switching purposes north for  $1\frac{1}{4}$  miles to where the railroad's freight trains were commonly made up. During this movement no cars were picked up or set out, no switching was done, and one stop was made at a railroad crossing. Four city streets used by the public were crossed, and two tracks of the other railroads, not used for main line traffic, were crossed. The track over which the movement was made was a lead from the interchange track, on which the cars were assembled, to the north yard. None of the cars had their brakes so connected as to be operated as required by the Safety Appliance Act.”

That case is a somewhat rigorous application of the *Louisville and Jeffersonville Bridge Case* upon which the Circuit Court of Appeals relied in holding the movement to have been a train movement. The facts are not stated as fully as they might have been with respect to the character and ordinary use of the mile and one-quarter lead track over which the unit was moved. Apparently the controlling factors in the mind of the court were the crossing of four city streets and two tracks of other railroads and the fact



that practically none of the track over which the movements involved were made was, as in the instant case, a track set apart for switching operations. Be that as it may, the case on the facts stated is an extreme one and not in harmony with the consensus of authority as we have endeavored to bring the cases together in this brief. Probably too much stress was laid by the defendant on the contention that a movement to be a train movement must be upon main line tracks, which contention had been finally and adversely disposed of in the *Northern Pacific case* (254 U. S. 251) and by the same Circuit Court of Appeals in the *Illinois Central case* (14 Fed. (2d) 747).

There remains in counsel's brief the unreported case of *United States v. Northern Pacific*, No. 12213, decided by Judge Neterer on December 1, 1928. From the statement of facts it seems that the movements "without air" of units of 10 to 17 cars for about a mile and one-half along the Seattle waterfront were made between distinct yards or to or from piers to or from the railroad company's yards. There was present in some of the counts the element of delivery from or to another carrier, but, more than that, any one who is even slightly acquainted with the Seattle waterfront will realize that there must have been unusual hazard from several sources.

Reference to Judge Neterer's opinion will show that most of the movements were lengthwise of streets, particularly Railroad Avenue. We are informed by counsel

for defendant in that case that the photographic exhibits in the case showed the great lengthwise use of streets, Railroad Avenue, Railroad Way, pavements, car tracks, and railroad crossings of the O. W. R. & N. Ry. and the Pacific Coast Railway, and that in the Government's brief in that case stress was laid *inter alia* on the following contention:

“Most of the trackage involved in our case is *along city streets, mostly planked or bricked, used indiscriminately both by the carrier and also by vehicular traffic and pedestrians.*”

The movements could not have been termed intra-yard movements in any sense of that expression and they were not, as here, upon tracks used within a general yard entirely for switching purposes.

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Courts have had occasion to define “switching operation” or “switching movement” in other classes of cases than those under the Safety Appliance Acts. It has been held that:

“The test of distinction between ‘transportation’ and ‘switching’ service of freight cars for which different rates are set by State Railroad Commission is not only whether the switching service follows transportation, but whether movement of cars is under the yardmaster’s direction, in which case it is switching service, or under trainmaster’s direction, in which case it is transportation service.” *St. Louis, I. M. & S. Ry. Co. v.*

*Clark Pressed Brick Co.*, 192 S. W. 382, 384, 127 Ark. 474.

“ ‘Transportation service’ is one which requires no other service to complete shipper’s object, while ‘switching or transfer service’ is one which precedes or follows transportation service, regardless of whether or not it involves use of portion of carrier’s main line or that of another.” *Andrews Steel Co. v. Davis*, 276 S. W. 148, 150, 210 Ky. 473.

“The word ‘switching’, as used in section 9000, Gen. Code, applies only to the movements within the terminal limits of a municipality of freight cars when incidental to the shipment as a whole or to the main journey, and has no application to shipments from one railway to another within the terminal limits of a municipality.” *Cincinnati, N. O. & T. P. Ry. v. J. B. Doppes’ Sons Lumber Co.*, 4 Ohio App. 22, 25, 35 Ohio Cr. Ct. R. 453.

“A switching service or transfer service is one which precedes or follows a transportation service and applies only to a shipment on which legal freight charges have already been earned, or are to be earned. The word ‘switching’ is synonymous with ‘transferring’.” *J. B. Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 110 N. E. 640, 642, 92 Ohio St. 206, L. R. A. 1916D, 452.

We do not contend that the tests described in the cases just cited are exclusive; they are however among the sound and standard distinctions constantly used in railroad operation.

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The position of appellant's counsel respecting use of the green track is not helped by their selection of authorities. Eleven cases are cited and relied on in their brief. In all of the Supreme Court cases and in eight of the eleven cases a substantial part of the movement found to be a train movement was over a main line customarily and almost entirely used in main-line transportation service by regular freight and/or passenger trains to which beyond any doubt the air-brake requirements applied and to which they were in practice applied. In six of those eight cases main lines of other railroads were also crossed. The remaining three cases not so clearly distinguishable from the instant one (14 Fed. (2d) 747; 36 Fed. (2d) 670 and the unreported opinion of Judge Neterer) presented, as we have shown, situations the court thought to be of unusual hazard although as we have said the 36 Fed. (2d) may fairly be regarded as an unreasonably strict application of the Supreme Court decision on which it relies.

In the case in the 14th Federal (2d) the movement was over a single lead track 4500 feet in length which was the only connection between two distinct yard units. "Tracks on other railroads were crossed at grade" and "that part of the yard at least was used by other railroads and was not the private property of the plaintiff in error". The outstanding differences between the Seattle case (the unreported decision) and the case at bar have been pointed out.

Considering the authorities as a whole and applying them to the facts in the case now before us, it is evident that



the trial court correctly concluded that the movements were essentially switching and not train movements.

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Further summing up the authorities relied upon by counsel for the appellant—and they are the leading authorities on the question—we think it fair to say:

a. That no one fact or circumstance controls the application of the air brake section. In each case, as stated by the trial court, “the question whether it be a train or a switching movement must be determined by the peculiar facts”, and, as said in the *Illinois Central Case* (14 Fed. (2d) 747):

“The decisions turn upon the particular facts of each case. All of them contain many varying and conflicting factors no one of which alone is controlling.”

b. While it is true, as stated by counsel, that the “character of the track, whether main line or not, is not controlling”, nevertheless the track used by the particular unit is often, as in the instant case, of great, if not unusual, weight in determining “the essential nature of the work done”.

c. It is true, as also stated by counsel, that switching may be done on a main line, but that is not important in this case because the green line was not a main line. It is equally true that where an operation is



carried on over such a track as the green track there is a strong, but not controlling, factual presumption that the operation is not a train operation.

d. Appellant's counsel say:

"2. A movement for a considerable distance of a number of cars as a unit without uncoupling or switching out a single car and which movement is not a sorting, or selecting or a classifying of the cars is not a switching movement." (Appls. Brief, p. 20.)

A movement for a considerable distance of such a unit without uncoupling or switching out a single car may or may not be a train movement but whether cars are uncoupled and switched out is only one factor to be considered. Whether it is a train movement also depends on other circumstances of equal or greater weight. The entire unit of work continuously performed must be considered. *The courts have not prescribed and in the nature of things cannot prescribe any distance which a drag may be moved or a switching operation conducted without coupling air.* They have considered all the circumstances, including the making up and breaking up of the drag as well as whether the movement under review was merely part of a larger unit of work that could fairly be called a switching operation.

Appellant's counsel attempt to surmount the obvious difficulties presented by the character of the green track by impliedly arguing that the controlling fact is that in the

movement thereover—which was merely part of a unitary switching operation—no cars were set out of or taken into the drag. That has never been regarded by a court as the controlling factor; its significance has been adverted to, but only in connection with the other facts. Obviously any switching movement must proceed **SOME** distance without setting out or picking up a car. Congress has not said what that distance may be before the movement becomes a train movement although it might do so, as have state legislatures in analogous statutes such as “full crew laws”. The courts have not lineally defined a train movement; indeed it is not possible for us to see how they could do so. It is much fairer—much more consistent with the spirit of the act—to say that if any one fact is to be given preponderating weight in the instant case it is the purpose, character and daily use of the green track.

e. While it is true, as stated by counsel, that a train movement within the act may be made without time tables or block signals and with a switching engine and a yard crew, yet the fact that the given movement is so made is strong evidence, when taken into account with the other surrounding circumstances such as those that appear in the case at bar, that the movement is not within the act.

f. We do not question the statement that the railroad cannot by designating a large area as a yard relieve itself from the operation of the act on all movements of strings of cars within that area. But we do say that the fact that a given movement is within a

yard of reasonable dimensions and between units of that yard used for distinct purposes requires substantial evidence to overcome the natural presumption that it is not a train movement.

On the undisputed facts of record the Government has not brought the case within any of the reported cases. If one attempts to compare any of them with the facts in the case at bar important differences are at once evident and we believe the learned trial judge correctly came to the conclusion (Rec. p. 32) "that 'the essential nature' of the movements in question was switching and not train movements'".

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### ***5. The Assignment of Error in Permitting Evidence of Comparative Safety Does Not Call for a Reversal.***

The only intermediate error assigned by appellant is that the trial court permitted a defendant's witness to answer, over objection, a question as to whether the operation complained of was safe or unsafe (Appellant's Brief, pp. 3-4, discussed on pp. 24-26).

In a strictly technical view of the issues the question, as framed, may have been improper; counsel cite cases to that effect (Appellant's Brief, p. 24). In another view the question was proper, at least as rebuttal, because the plaintiff had already offered evidence (Rec. pp. 44-46) as to the grade crossings traversed and their protection, and also argue in their brief that

there is a hazard caused by fog, both of which can have no other purpose than to support a claim that there was an unnecessary hazard in the operation as conducted.

Moreover, as we argue under division 2 of this chapter, the court was entitled to consider the question of comparative hazard in determining the "essential nature of the work done".

But even if the trial judge should have sustained the objection to the question as propounded, his failure so to do does not call for a reversal.

The case was tried *without a jury*, which had been duly waived (Rec. pp. 23-24). After submission the trial judge filed an opinion in which, seemingly in direct response to the testimony admitted over objection and as to which error is assigned, he held:

"In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased."

The opinion was filed on November 27, 1931 (Rec. p. 32). On December 14, 1931, Judge Norcross wrote the clerk a letter, a copy of which appears in the stipulation at page 34 of the record; by that letter he expressly eliminated from his opinion the paragraph next above quoted. The copy of the opinion printed in



the transcript of record shows that that paragraph was eliminated from the original opinion by the clerk drawing lines through it (Rec. p. 35). At no other place in the opinion does the learned trial judge discuss, or express any conclusion as to, the question of safety. He made no finding on the subject and concluded his opinion by saying (Rec. p. 32) :

“The conclusion reached upon the facts presented in the case at bar is that ‘the essential nature’ of the movements in question was switching, and not train movements.

Judgment for defendant.”

Giving proper weight to the circumstance that the case was not tried before a jury and that therefore we *do* know from the trial judge’s written opinion and his amendatory letter what evidence was considered by him in coming to his conclusion, we respectfully submit that it is apparent that the ruling, even if error, was harmless. “Mere error is not enough to require reversal of the judgment, if the record discloses that no injury could have resulted therefrom” (*Carlyle Packing Co. v. Sandanger*, 259 U. S. 225, 66 L. Ed. 927). Nor will a decision of a lower court be reversed, if correct on the merits, merely because the lower court has intermediately erred in exclusion or acceptance of evidence (*Stover Mfg. Co. v. Mast, Foos & Co.*, 89 Fed. 333, 32 C. C. A. 231, affirmed in 177 U. S. 485, 44 L. Ed. 856; *Aetna Indemnity Co. v. Crowe*, 154 Fed. 545, 83 C. C. A. 431, certiorari denied in 207 U. S. 589, 52 L. Ed. 354; *Wiener v. Union Trust Co.*, 261 Fed. 709) ; and the



same result follows even where the trial was before a jury if it appears, as we claim here, that the complaining party on appeal was not entitled to succeed in any event (*Donohue v. Boston & Maine R. R.*, 209 Fed. 824, 126 C. C. A. 548; *Vagaszki v. Consolidated Coal Co.*, 225 Fed. 913, 141 C. C. A. 37; *Howland v. Corn*, 232 Fed. 35, 146 C. C. A. 227). Appellant admits that "the sole question involved in this case is whether the five transfer movements were train movements . . . ." (Appellant's Brief, "C", p. 4).

But counsel for appellant do not claim that the ruling was prejudicial. They assert merely (Appellant's Brief, p. 25):

"From the foregoing citations it is evident that the admission of the testimony objected to was clearly inadmissible, and it was therefore error to permit the question to be answered. In addition the introduction of such testimony tends to becloud the issue and should for that reason have been excluded."

Moreover, the trial judge reserved his ruling on plaintiff's motion to strike out the answer to the question the allowance of which is now assigned as error (Rec. p. 67), and the effect of the amended opinion of the trial court is the same as though the motion had been granted. It is analogous to instructing the jury to disregard testimony after refusing to strike it from the record, which was held in this circuit to cure the error in denying the motion to strike (*United Verde etc. Co. v. Littlejohn* (C. C. A. 9th Cir.), 279 Fed. 223.

Curiously enough, while counsel argue on page 24 of their brief that the considerations of safety were for Congress and that the duty imposed is absolute and cannot be obviated by adoption of equivalent requirements, they almost immediately proceed (page 25) to argue that San Francisco is subject to dense fogs that make all kinds of traffic hazardous, and elsewhere (Appellant's Brief, p. 23) they argue that the crossings of streets at grade made the movements more than ordinarily hazardous.

We respectfully submit that if the trial judge was correct in holding that the movement in question was not a train movement, the defendant's attempt to answer the plaintiff's grade crossing testimony was without prejudice to the plaintiff or effect on the judicial mind or the decision on the merits. Moreover the question of comparative safety is, as we heretofore argue, proper to be considered as bearing on the question of "the essential nature of the work done".

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### *In Conclusion.*

We feel that, even if the law be given the broadest construction contended for by counsel in its application to the facts, it is apparent that a clear case of violation of the power brake section of the Safety Appliance Acts was not presented by the evidence. The physical facts were undisputed and indisputable. Had the case been a clear one of violation it would have

proceeded no further than a plea of guilty; such is the usual result of cases of this character which almost always arise from careless practices or a misconstruction of the law by railroad officials which has been perversely insisted upon in the face of warnings. The background of this case is entirely different. The movement over the green track was but a part of a larger unit of movement which was aptly described by the trial court as having the essential nature of a switching movement. No movements occurred over or across a main line. The green track itself, as characterized by the trial court (Opinion, Rec. p. 30) "in purpose and reality is but an extension of such switching tracks"—the tracks shown in areas "A" and "B". A practice of long standing is here attacked under what we believe to be an extreme and unreasonable construction of the statute. The appellee has genuinely attempted to comply with the law in its San Francisco yard operation. For many years operations over the green track such as those here challenged have been carried on in the same manner as that now sought to be condemned, but during the same period operations of drags over the parallel and adjacent red main line have been performed with the air hose coupled and the power brake operative.

No case under the air brakes section that has found its way into the books is so free from cause to characterize it as one of unusual hazard. A reversal in this case would necessarily require the defendant in the move-

ments complained of and all similar movements to apply the statute to an extent hitherto not contended for on a similar state of facts. In effect it would ascribe to Congress an intention in the use of the word "train" that we do not believe existed in the legislative mind; putting the thought differently it would by judicial construction enlarge the jurisdiction of the Commission to include a field of yard operation which at least so far as this defendant is concerned it has not up to this time attempted to occupy. It would not have been difficult for Congress to prescribe as cases arose from time to time some or all of the tests which counsel for plaintiff now claim are controlling on the question of whether a given movement is a train movement, but the fact remains that Congress has not done so, and counsel for the Government should no more be permitted to re-write the statute in the interest of a new and extreme construction than should counsel for the carrier be allowed to break down its spirit and purpose by too liberal an interpretation.

Taking the facts alone and applying to them the language of the statute with the aid of the interpretations thereof made by a long line of authoritative decisions the utmost that in fairness could be said for the case would be that it is somewhere near the dividing line between train and non-train operation. We have defended in the firm belief that it is not even so favorable to the plaintiff—that a judgment in favor of the plaintiff can be ordered only by an unreason-



able and a strained construction of the statute and by the stringing together of isolated expressions from individual decisions upon different states of fact without a consideration of the purpose of the statute, the reasons behind the exemptions settled by the Supreme Court decisions, and all of the surrounding facts and circumstances of the case at bar.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

HENLEY C. BOOTH,

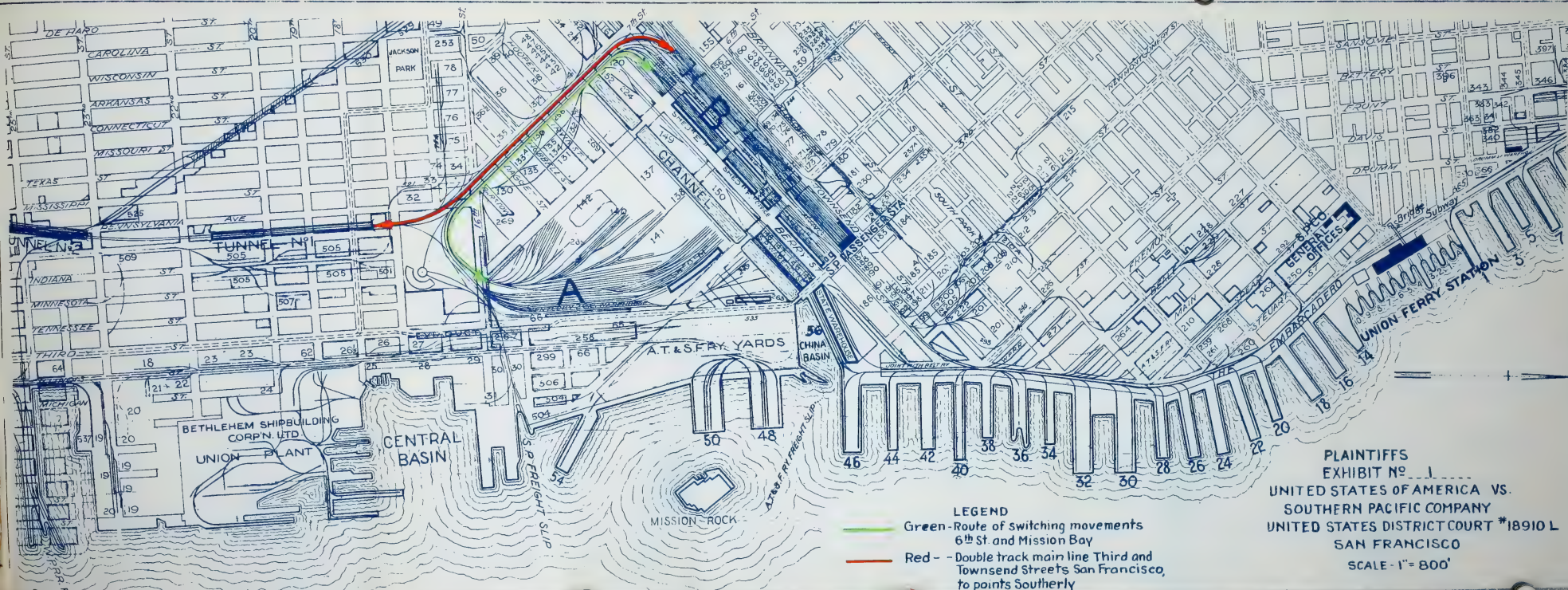
AUGUSTUS G. GOODRICH,

*Attorneys for Appellee.*

San Francisco, California,

June 17, 1932.





- LEGEND
- Green - Route of switching movements 6th St and Mission Bay
  - Red - Double track main line Third and Townsend Streets San Francisco, to points Southerly

PLAINTIFFS  
EXHIBIT No. 1  
UNITED STATES OF AMERICA VS.  
SOUTHERN PACIFIC COMPANY  
UNITED STATES DISTRICT COURT #18910 L  
SAN FRANCISCO  
SCALE - 1" = 800'



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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THE AETNA CASUALTY & SURETY COM-  
PANY, a Corporation,

Appellant,

vs.

THE NATIONAL BANK OF TACOMA, a Na-  
tional Banking Association,

Appellee.

---

Transcript of Record.

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Upon Appeal from the United States District Court for  
the Western District of Washington,  
Southern Division.

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FILED

APR 6 - 7

PAUL H. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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THE AETNA CASUALTY & SURETY COM-  
PANY, a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL OF RECORD.

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For Defendant and Appellant:

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ELLIOT, JR., #412 Dexter Horton Build-  
ing, Seattle, Washington.

HENDERSON, CARNAHAN & THOMP-  
SON, #1414 Puget Sound Bank Building,  
Tacoma, Washington.

---

In the Superior Court of the State of Washington,  
in and for Pierce County.

No. 66,244.

THE NATIONAL BANK OF TACOMA, a Na-  
tional Banking Corporation,

Plaintiff,

vs.

THE AETNA CASUALTY AND SURETY COM-  
PANY, a Corporation,

Defendant.

### COMPLAINT.

Plaintiff for cause of action against defendant  
shows and alleges as follows, to wit:

## 2      *The Aetna Casualty & Surety Company*

### I.

That at all the times hereinafter mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the United States relative to national banks, having its principal place of business in Tacoma, in Pierce County, Washington, where it has been and is transacting a general banking business.

### II.

That the defendant, The Aetna Casualty and Surety Company, at all the times hereinafter mentioned was and now is a foreign corporation, duly authorized to act as surety and to write insurance in the State of Washington and having an office for the transaction of business, and where it was and is engaged in the transaction of business in Tacoma, in Pierce County, Washington; and that at all of said times P. V. Caesar was and now is an agent of said defendant corporation, duly authorized and licensed to solicit and procure insurance to be written by said company and was and now is a resident vice-president of said company, fully authorized and empowered to sign and execute on behalf of said defendant corporation any and all bonds and undertakings, including bonds of the kind and character hereinafter described; and that W. H. Van Horn was at all times hereinafter mentioned a resident assistant secretary of said defendant corporation, fully authorized and empowered to affix the seal of said company to and attest on behalf of [2\*] said company any and all bonds and undertakings.

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\*Page-number appearing at the foot of page of original certified Transcript of Record.

## III.

That American Wood Pine Company is a corporation organized and existing under and by virtue of the laws of the State of Washington and at all the times hereinafter mentioned up to April 19, 1929, was doing business at Tacoma, in Pierce County, Washington, and maintaining there a factory for the manufacture and sale of wood pipe and other wood products and for the needs of such business was required from time to time to borrow large sums of money from the plaintiff, and in connection with such borrowings did for a valuable consideration on or about the 8th day of August, 1921, execute and deliver to the plaintiff its General Loan and Collateral Agreement, a copy of which is attached hereto marked Exhibit "A" and made a part hereof by this reference to all intents and purposes as fully as though set out herein at length.

That at all times since August 8th, 1921, said general loan and collateral agreement has been and is in full force and effect, and by the terms thereof any security of whatsoever kind or nature furnished by said American Wood Pipe Company to the plaintiff for any of its indebtedness could be and is held by the plaintiff not only as security for the particular indebtedness for or in connection with which the same was pledged, hypothecated or created, but also for any and all other indebtedness, obligation or liability of said Pipe Company to the plaintiff now or whensoever created, incurred and/or evidenced.

## IV.

That prior to January 21, 1929, said American

#### 4     *The Aetna Casualty & Surety Company*

Wood Pipe Company, being in need of financial assistance to enable it to continue in business and in operation and to enable it to execute and fill orders that might be received and accepted, requested the plaintiff to make from time to time advances against the earnings of orders that might thereafter be taken for execution, and the plaintiff declined to consider or entertain any such proposition and refused to agree to make any such loans or advances unless and until it should be furnished with a surety bond guaranteeing to it the existence and *bona fides* of each such order and that the same would be filled and executed according [3] to its terms, and that to procure the necessary loans and advances, said American Wood Pipe Company undertook and agreed to provide such bond in connection with each such loan thereafter applied for.

#### V.

That thereafter and on January 21, 1929, in accordance with the basis of operation theretofore discussed, said American Wood Pipe Company applied to the plaintiff for a loan of \$3,375.00 against the future earnings of an alleged contract between said Pipe Company and Twin Harbors Lumber Company, which latter was then and still is a wholly solvent corporation; said loan being applied for to enable said Pipe Company to continue in business and to carry out such order; and to obtain the loan or advance thus applied for said Pipe Company executed and delivered to the plaintiff an assignment of the proceeds or earnings of an alleged contract with Twin Harbors Lumber Company, copy of which as-



sigment is hereto annexed marked Exhibit "B" and made a part hereof by this reference as fully and to all intents and purposes as though set out herein at length, and contemporaneously therewith and as part of the same transaction furnished and delivered to the plaintiff a bond duly executed by it as principal and the defendant, the Aetna Casualty and Surety Company, as surety, in the penal sum of \$4,000.00, copy of which bond is hereto attached marked Exhibit "C" and made a part hereof as fully and to all intents and purposes as though set out herein at length.

That said bond was executed, issued and delivered, by the defendant herein for a valuable consideration and with knowledge and intent that it would be delivered to the plaintiff, an obligee named therein, as a basis of credit and as indemnity against any loss which the plaintiff might sustain by reason of the failure of the said American Wood Pipe Company to perform the contract hereinabove and in said bond referred to and described according to the terms thereof and with intent and knowledge that the plaintiff should and would rely thereon for such indemnity and for the truth of the facts in said bond recited as to the existence, nature and terms of the contract described. [4]

## VI.

That the plaintiff believing the recitals of said bond as to the existence, nature and terms of said contract to be true, and relying thereon and upon the indemnity thereby agreed and intended to be provided, accepted said bond and the assignment of



## 6      *The Aetna Casualty & Surety Company*

the proceeds of the contract therein referred to, and so believing and relying paid a valuable consideration for such assignment, to wit, by loaning or advancing to said American Wood Pipe Company the sum of \$3,375.00, which loan or advance was evidenced by the promissory note of said American Wood Pipe Company then contemporaneously made, executed and delivered by said Pipe Company to this plaintiff, copy of which note is hereto annexed marked Exhibit "D" and made a part hereof by this reference as fully and to all intents and purposes as though set out herein at length. That except for said recitals in said bond and representations thereby made by the defendant herein to the plaintiff, plaintiff would not have made said loan or advance nor accepted said assignment which was taken as security not only for the moneys advanced and loaned to the American Wood Pipe Company contemporaneously with the acceptance of the assignment and bond, but also in accordance with the terms of the general loan and collateral agreement hereinabove referred to for any and all other obligations of indebtedness to it of said Pipe Company, on which there is due and unpaid an amount largely in excess of the penalty of said bond.

### VII.

That said American Wood Pipe Company wholly failed and neglected to carry out and perform said alleged contract with said Twin Harbors Lumber Company in said bond described and referred to either within the time specified in said contract or at all; and as plaintiff is informed and believes there

was in truth and in fact no such written order from or contract with said Twin Harbors Lumber Company and that the recitals in said bond and the representations thereby made by the defendant herein as to said alleged contract were wholly false. [5]

### VIII.

That thereafter and on or about the 19th day of April, 1929, said American Wood Pipe Company became wholly insolvent, suffered a Receiver to be appointed of its business and affairs and to wind up the same, and that no part of the loan or advance made by this plaintiff in reliance upon said false and fraudulent representations was repaid by said American Wood Pipe Company prior to said receivership or has been since or will hereafter be repaid by said Receiver, and that no part of the proceeds of the alleged contract so assigned to this plaintiff has been or will be paid to it.

### IX.

That plaintiff has heretofore demanded of the defendant payment of its said loss and damage in accordance with the intent and tenor of said bond and the defendant has heretofore generally denied any and all liability whatsoever upon said bond and has wholly failed and refused to pay to the plaintiff its said loss or any part thereof and accordingly there is now due and owing to the plaintiff from the defendant the full sum of \$3,752.50, with interest at 6% per annum from January 21, 1929, until paid.

WHEREFORE, plaintiff prays judgment against the defendant for said sum of \$3,752.50, with inter-

8      *The Aetna Casualty & Surety Company*

est at 6% per annum from January 21, 1929, until paid and for its costs and disbursements herein caused to be expended.

HAYDEN, LANGHORNE & METZGER,

Attorneys for Plaintiff.

Office & P. O. Address:

523 Tacoma Bldg., Tacoma, Washington. [6]

Filed in Superior Court, Pierce County, Wash.  
Aug. 4, 1930. J. K. Scott, Clerk. By J. F. M.,  
Deputy. [7]

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[Title of Court and Cause—No. 66,244.]

SUMMONS.

The State of Washington, to the said The Aetna  
Casualty and Surety Company, a Corporation,  
Defendant:

You are hereby summoned to appear within twenty days after service of this summons upon you, exclusive of the day of service, if served within the State of Washington; or within sixty days after service upon you, exclusive of the day of service, if served out of the State of Washington, and answer the complaint and serve a copy of your answer upon the undersigned at the place below specified, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint which will be filed with the Clerk of

said court, a copy of which is herewith served upon you.

HAYDEN, LANGHORNE & METZGER,  
Attorneys for Plaintiff.

P. O. Address: 523 Tacoma Building, Tacoma,  
Pierce County, Washington.

Filed Aug. 4, 1930. [8]

EXHIBIT "D."

No. 66244.

\$3,375.00. Tacoma, Wash., January 21, 1929.

On demand after date, we promise to pay to the order of THE NATIONAL BANK OF TACOMA AT ITS OFFICE IN THE CITY OF TACOMA THREE THOUSAND THREE HUNDRED SEVENTY-FIVE Dollars, for value received, with interest from date at the rate of 7 per cent. per annum until paid.

Principal and interest payable only in U. S. Gold Coin of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, nor as a surety, and promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit.

AMERICAN WOOD PIPE COMPANY.

By VAUGHAN MORRILL, Pres.

By CYRUS HAPPY, Jr., Secty.



10    *The Aetna Casualty & Surety Company*

No. 75583.

THIS NOTE SECURED BY:

Shipment Number 8472.

Consignee, Twin Harbors Lbr. Co.

Destination, Chicago, Ill.

Date Shipped, Jan. 21, 1929.

Invoice .....	\$3,950.00
Less Deductions .....	197.50
Estimated Freight .....	_____
Margin .....	377.50

---

Advance ..... 3,375.00

Notify Twin Harbors Lbr. Co., Aberdeen, Wash.

(Exhibit "D").

Filed in Superior Court, Pierce County, Wash.,  
Aug. 4, 1930. J. K. Scott, Clerk. By J. F. M.,  
Deputy. [9]

EXHIBIT "A."

No. 66244.

GENERAL LOAN AND COLLATERAL AGREEMENT.

Tacoma, Washington, August 8, 1921.

In order to obtain loans from and otherwise deal with THE NATIONAL BANK OF TACOMA, the undersigned agrees that all loans, advances or credits hereafter or heretofore obtained from said Bank by the undersigned shall be repayable by the undersigned at said Bank on demand, unless otherwise agreed in writing at the time, and shall bear interest at rates to be agreed upon; and the undersigned, for value received, hereby assigns to THE



NATIONAL BANK OF TACOMA, as security for any and all indebtedness, obligation or liability of the undersigned to said Bank, now or hereafter existing, matured or not matured, absolute or contingent, individual or firm, and wherever payable, including in addition to other indebtedness, obligation and liability, all such as may arise from endorsements of notes, acceptances or any other items or paper discounted by said Bank or held by said Bank, either absolutely or as collateral security to any loans or advances of any sort whatever and including overdrafts and indebtedness by the undersigned to said Bank on account of collections or paper received for collection by the undersigned, the following, viz.: All moneys, chattels, negotiable instruments, securities, bills of lading, warehouse receipts, paper, credits, demands, choses in action, rights and property of every kind, tangible or intangible, at any time in possession or control of said Bank or any of its agents or correspondents, or in transit to it by mail or carrier, belonging to, for account or subject to the order of the undersigned, it being understood and agreed that the said THE NATIONAL BANK OF TACOMA, its successors or assigns, are not to be responsible for any injury or loss to the same or any part thereof arising from the act of God, robbery, fire, flood, or from negligence, fraud or any other act or default of warehousemen or common carriers, their agents, or servants, or from any other cause whatsoever, whether similar or dissimilar to the causes specified; and that said Bank, its successors or assigns, shall not be liable for any negligence, act or default of any

## 12    *The Aetna Casualty & Surety Company*

of its collecting agents or correspondents; [10] and the undersigned hereby irrevocably authorizes the said THE NATIONAL BANK OF TACOMA, at any and all times at its option to hold and collect any and all thereof, and the proceeds thereof, to endorse any thereof on behalf of and in the name of the undersigned, to sell without advertisement or notice any part or all thereof at private or public sale, at the option of said Bank, (said Bank being at liberty to become the purchaser if the sale is public), and to apply and any all said property or proceeds thereof, and also any and all debts, liabilities or balances in favor of the undersigned, (including such as arise from deposits, discounts, collections or items in transit), now or hereafter owing or due from or chargeable against said Bank or any of its agents and correspondents, to the payment of expenses of any such sale or sales or the negotiation or collection of any of said collaterals and to the payment of any or all of said indebtedness, obligation or liability of the undersigned, at the option of the officers of said Bank, whether said indebtedness, obligation or liability of the undersigned, at the option of the officers of said Bank, whether said indebtedness, obligation or liability to which the same is applied be then matured or not. Said Bank may assign or transfer the whole or any part of said indebtedness, obligation or liability of the undersigned and may transfer therewith, as collateral security therefor, the whole or any part of the chattels, instruments, securities, papers, credits, demands, choses in action, right and property hereby assigned to said Bank, and the trans-

feree shall have the same rights, powers and authority with reference to the indebtedness, obligation or liability transferred and the collaterals transferred therewith as are hereby given to said Bank, and said Bank and its officers shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter. This instrument shall irrevocably apply to all dealings and transactions heretofore or hereafter had with said Bank, unless the undersigned and said Bank shall otherwise expressly agree in writing signed by the undersigned and said Bank, and no provision of this instrument shall be deemed to be waived by said Bank unless said waiver is in writing and signed by said Bank or duly authorized agent.

The undersigned hereby expressly waives protest, demand [11] and notice of non-payment of all negotiable instruments at any time held by said Bank and signed or endorsed by the undersigned.

In case any suit or action is begun by said Bank or any transferee to recover any sum of money on any such indebtedness, obligation or liability, either under this instrument or otherwise, the undersigned promises to pay a reasonable sum as attorney's fees in such suit or action, and such attorney's fees shall be deemed an obligation secured by this pledge.

AMERICAN WOOD PIPE COMPANY.

By VAUGHAN MORRILL, Pres.

F. N. INSINGER, V.-Pres.

Witness.

F. J. LOOMAN.

(Exhibit "A.")

14    *The Aetna Casualty & Surety Company*

Filed in Superior Court, Pierce County, Wash.,  
Aug. 4, 1930. J. K. Scott, Clerk. By J. F. M.  
Deputy. [12]

EXHIBIT "B."

No. 66244.

AMERICAN WOOD PIPE CO.

Tacoma, Wash., January 21, 1929.

Req. No. 1/19/28

Our Order No. 8472

Terms 2% and 5% Com.

F. O. B. our mill

Sold to TWIN HARBORS LUMBER CO.,

ABERDEEN, WASHINGTON,

Shipped to ABOVE AT CHICAGO, ILL.

#2 Clear & Better Kiln Dried Fir S2S

1¼ x 3¾"—Edges Rough 1½ x 4" 9 length 50,000 ft. \$41.50M  
\$2075.00

Ditto 8 50,000 37.50 "

1875.00

---

\$3950.00

For value received we hereby assign, sell, trans-  
fer and set over unto THE NATIONAL BANK  
OF TACOMA, TACOMA, WASH., the above ac-  
count together with all title and interest now or  
hereafter owned in the goods and merchandise for  
which said account was incurred.

AMERICAN WOOD PIPE COMPANY.

By VAUGHAN MORRILL.

VAUGHAN MORRILL,

President.

(Exhibit "B.")



Filed in Superior Court, Pierce County Wash.,  
Aug. 4, 1930. J. K. Scott, Clerk. By J. F. M.  
Deputy. [13]

EXHIBIT "C."

No. 66244.

THE AETNA CASUALTY AND SURETY COM-  
PANY,

Hartford, Connecticut.

Morgan B. Brainard,

President.

KNOW ALL MEN BY THESE PRESENTS:  
That we, AMERICAN WOOD PIPE COMPANY,  
a corporation of the State of Washington with prin-  
cipal place of business at Tacoma, Washington as  
Principal, and THE AETNA CASUALTY AND  
SURETY COMPANY of Hartford, Connecticut,  
as Surety, are held and firmly bound unto TWIN  
HARBORS LUMBER COMPANY of Aberdeen,  
Washington, and/or THE NATIONAL BANK OF  
TACOMA, TACOMA, WASHINGTON in the penal  
sum of FOUR THOUSAND AND No/100 (\$4,-  
000.00) Dollars, lawful money of the United States,  
for the payment of which, well and truly to be made  
the said principal and the said Surety bind them-  
selves, their heirs, executors, administrators, succes-  
sors and assigns, jointly and severally firmly by  
these presents.

Signed and sealed this 21st day of January, A. D.  
1929.

THE CONDITION OF THIS OBLIGATION  
is such that, WHEREAS, the said Principal has



16    *The Aetna Casualty & Surety Company*

accepted a written order from the TWIN HARBORS LUMBER COMPANY of Aberdeen, Washington and/or THE NATIONAL BANK OF TACOMA, TACOMA, WASHINGTON, dated January 19th, 1929, for furnishing the following quantity of material:

50 M. B. M.  $1\frac{1}{2} \times 4$  8 Ft. S2S  $1\frac{1}{4} \times 3\frac{3}{4}$  Edges Rough  
@ \$41.50 f. o. b. Tacoma.

50 M. B. M.  $1\frac{1}{2} \times 4$  9 Ft. S2S  $1\frac{1}{4} \times 3\frac{3}{4}$  Edges Rough  
@ 37.50 f. o. b. Tacoma, shipment to be made within sixty days, which order is by reference made a part hereof as fully to all intents and purposes as if set forth at length herein.

NOW, THEREFORE, if the said Principal shall supply the material in accordance with the written order, and if they will indemnify TWIN HARBORS LUMBER COMPANY of Aberdeen, Washington and/or THE NATIONAL BANK OF TACOMA, TACOMA, WASHINGTON, against any direct or, indirect damages that may be suffered or claimed for lack of delivery of material within the time called for; and further conditioned as required by law for the payment of all laborers, mechanics, sub-contractors and materialmen, and all persons who shall supply such person or persons or sub-contractors [14] with provisions or supplies for the carrying on of such work, and all just debts, dues and demands incurred in the performance of the work, then and in that event this obligation shall be void, but otherwise it shall remain in full force and effect.

IN TESTIMONY WHEREOF, the said Principal and the said Surety have hereunto caused this instrument in writing to be signed and sealed by their duly authorized officers.

AMERICAN WOOD PIPE COMPANY.

(Corporate Seal)

By VAUGHAN MORRILL, Pres.

THE AETNA CASUALTY AND SURETY  
COMPANY.

By P. V. CAESAR,  
Resident Vice President.

(Corporate Seal)

Attest: W. H. VAN HORN,  
Resident Assistant Secretary.

(Exhibit "C.")

Filed in Superior Court, Pierce County, Wash.,  
Aug. 4, 1930. J. K. Scott, Clerk. By S. P., Deputy.  
[15]

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[Title of Court and Cause—No. 66,244.]

SPECIAL APPEARANCE OF COUNSEL.

We, the undersigned, hereby enter the appearance of the defendant, The Aetna Casualty and Surety Company, in the above-entitled cause and ourselves as its attorneys limited for the purpose of presenting a petition for removal of said cause

18    *The Aetna Casualty & Surety Company*

to the United States District Court for the Western District of Washington, Southern Division.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant,  
412 Dexter Horton Building, Seattle, Washington.

Filed Aug. 4, 1930.    [16]

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[Title of Court and Cause—No. 66,244.]

NOTICE OF FILING PETITION AND BOND  
FOR REMOVAL OF CAUSE.

To the National Bank of Tacoma, Plaintiff, and  
Hayden, Langhorne & Metzger, Its Attorneys:

You and each of you will please take notice that the above-named defendant will on the 4th day of August, 1930, file in the office of the Clerk of the above-entitled court a petition and bond for the removal of said cause from said court to the United States District Court for the Western District of Washington, Southern Division, a copy of which petition and bond is herewith served upon you, and that on said day at the hour of 2 o'clock in the afternoon or as soon thereafter as its counsel can be heard, the defendant will present the

petition and bond to said court for an order of removal of said cause to the said District Court.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant and Petitioner,  
412 Dexter Horton Building, Seattle, Washington.

Filed Aug. 4, 1930. [17]

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[Title of Court and Cause—No. 66,244.]

### PETITION FOR REMOVAL.

The petition of the above-named defendant respectfully shows to this court.

#### I.

That this cause was commenced in the above-entitled court on the 25th day of June, 1930, by the service of a copy of the summons and complaint herein upon the defendant through the office of the Insurance Commissioner of the State of Washington, and that the time to plead or demur to the said complaint has not expired under the laws of said state.

#### II.

That the action is one of civil nature at common law, to wit, a suit to recover against the defendant in damages for the alleged breach of a certain bond in writing which the defendant executed as surety.



## III.

That the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00), to wit: \$3,752.50, besides interest and costs of suit, all of which will more fully appear from the complaint in said action, which is hereby referred to and made a part hereof.

## IV.

That at the time of the commencement of the above-entitled action and ever since said time plaintiff was and now is a citizen and resident of the State of Washington, a corporation organized and existing under and by [18] virtue of the laws of the State of Washington, maintaining its office and place of business in Tacoma, Pierce County, State of Washington, and was and is a resident of the State of Washington.

## V.

That the defendant was at the time of the commencement of said action and ever since has been and now is a nonresident of the State of Washington, and a corporation foreign to said state and organized and existing under and by virtue of the laws of the State of Connecticut, maintaining its principal office and place of business in Hartford, Connecticut, and a citizen and resident of said State of Connecticut.

## VI.

That the defendant has given to the plaintiff in said action written notice of the filing and hearing of this petition.

VII.

That your petitioner files herewith a good and sufficient bond in the penal sum of Five Hundred Dollars (\$500.00) as provided by the law and statutes made and provided and conditioned that defendant will enter in the United States District Court for the Western District of Washington, Southern Division, within thirty days from the date of filing, this petition, a certified copy of the record in this action, and further condition for the payment of all costs which may be awarded by said court if the said District Court shall determine that this suit was wrongfully and improperly removed thereto.

WHEREFORE your petitioner prays that this court proceed no further herein except to order the removal of said cause to said United States District Court for the Western District of Washington, Southern Division, and to accept the bond presented herewith and direct a certified transcript of the records herein to be made for said District Court as provided by law by the Clerk of this court.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Petitioner,  
412 Dexter Horton Building, Seattle, Washington.

State of Washington,  
County of King,—ss.

Henry Elliott, Jr., being first duly sworn on oath, deposes and says: That he is one of the attorneys of record for the Aetna Casualty and Surety Company, a corporation, defendant in the above-entitled action, and makes this verification for and on behalf of said defendant for the reason that no other officer or agent of said corporation authorized to make said verification is now within the State of Washington, and that he is duly authorized to make said verification; that he has read the foregoing petition, noticed the contents thereof and believes the allegations therein contained to be true.

HENRY ELLIOTT, Jr.

Subscribed and sworn to before me this 1st day of August, 1930.

J. SPEED SMITH,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed Aug. 4, 1930. [20]

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[Title of Court and Cause—No. 66,244.]

### BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, the Aetna Casualty and Surety Company, a corporation under the laws of the State of Connecticut, as principal, and National Surety Company, a corporation organized and existing under the laws

of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the National Bank of Tacoma, plaintiff in the above-entitled cause, its successors and assigns in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America for the payment of which, well and truly to be made we and each of us bind ourselves and each of us, our successors and assigns, jointly and severally, by these presents.

Dated at Seattle, Washington, on the 1st day of August, 1930.

The conditions of this obligation are such that

WHEREAS, the said The Aetna Casualty and Surety Company, a corporation, has petitioned the above-entitled court for the removal of a certain cause therein pending wherein the National Bank of Tacoma, a corporation, is plaintiff, and the Aetna Casualty and Surety Company, a corporation, is defendant, to the United States District Court for the Western District of Washington, Southern Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said court be stayed.

NOW, THEREFORE, if the said Aetna Casualty and Surety Company, a [21] corporation, shall enter in said United States District Court, aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall pay or cause to be paid all costs that may be awarded therein by said United States



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District Court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

THE AETNA CASUALTY AND SURETY  
COMPANY, a Corporation,

By J. SPEED SMITH and

HENRY ELLIOTT, Jr.,

Its Attorneys,

Principal.

[Corporate Seal]

NATIONAL SURETY COMPANY, a Corporation,

By J. H. LOBDELL,

Surety,

Attorney-in-fact.

The foregoing bond is hereby approved this 4 day of August, 1930.

E. D. HODGE,

Judge.

Filed Aug. 4, 1930.

Entered Book of Bonds Q, page 619. [22]

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[Title of Court and Cause—No. 66,244.]

ORDER FOR REMOVAL OF CAUSE.

This cause coming on duly and regularly for hearing upon the petition of the defendant herein for the removal of this cause to the United States District Court for the Western District of Washington, Southern Division, and it appearing to the

court that the cause is one of civil nature, and that the amount in dispute exceeds the sum of Three Thousand Dollars (\$3,000.00), and that the plaintiff is a citizen and resident of the State of Washington, and that the defendant is a citizen and resident of the State of Connecticut, and that the plaintiff has been given due notice of the filing and hearing of said petition, and that the defendant has filed with its said petition a good and sufficient bond approved by the court and conditioned as provided by law and the court being fully advised, it is now by the court

ORDERED that said petition be granted and that said cause be removed to the United States District Court for the Western District of Washington, Southern Division, and that the Clerk of this court make up a certified transcript of the records herein for said District Court as provided by law, and that there be no further proceedings herein.

Done in open court this 4 day of August, 1930.

E. D. HODGE,  
Judge.

Filed Aug. 4, 1930.

Entered Jour. 228, page 443. [23]

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[Title of Court and Cause—No. 66,244.]

CERTIFICATE ON REMOVAL TO U. S. DISTRICT COURT.

State of Washington,  
County of Pierce,—ss.

I, J. K. Scott, County Clerk, and by virtue of the

laws of the State of Washington, *Ex-officio* Clerk of the Superior Court of the State of Washington, in and for Pierce County, do hereby certify that I have compared the foregoing copy of the complaint; summons; note; general loan and collateral agreement (Exhibit "A"); invoice (Exhibit "B"); bond (Exhibit "C"); special appearance; notice; petition for removal; bond on removal; and order for removal of cause; to the United States District Court, for the Western District of Washington, Southern Division, at Tacoma, with the originals in the above-entitled action, now on file and of record in this office, and that the same is a true and correct copy of the whole and every part of the original record in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Superior Court at my office in the City of Tacoma, this 19th day of August, 1930.

[Seal of Superior Court]

J. K. SCOTT,

County Clerk.

By Stella Parker,

Deputy.

E. R.

[Endorsed]: Filed Sep. 4, 1930. [24]

In the District Court of the United States of America, in and for the Western District of Washington, Southern Division.

No. 8176.

THE NATIONAL BANK OF TACOMA, a National Banking Corporation,

Plaintiff,

vs.

THE AETNA CASUALTY AND SURETY COMPANY, a Corporation,

Defendant.

### NOTICE OF REMOVAL.

To the Above-named Plaintiff and to Hayden, Langhorne & Metzger, its attorneys:

You and each of you are hereby notified that on the seventh day of August, 1930, by an order of the Superior Court for Pierce County the above-entitled cause was duly removed from said court to the District Court of the United States for the Western District of Washington, Southern Division, and a transcript of the record of said cause was filed in said District Court of the United States on the 4th day of September, 1930.



Dated this 4th day of September, 1930.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant,  
412 Dexter Horton Building,  
Seattle, Washington.

[Endorsed]: Filed Sept. 5, 1930. [25]

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[Title of Court and Cause—No. 8176.]

DEMURRER.

Comes now the defendant and demurs to the complaint herein upon the ground and for the reason that said complaint does not state facts sufficient to constitute a cause of action against the defendant.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant,  
412 Dexter Horton Building,  
Seattle, Washington.

[Endorsed]: Filed Oct. 1, 1930. [26]

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[Title of Court and Cause—No. 8176.]

MOTION TO MAKE MORE DEFINITE AND  
CERTAIN.

Comes now the defendant and moves that the

court order the plaintiff to make its complaint herein more definite and certain in the following particulars, to wit:

I.

Referring to Paragraph IV, that the plaintiff be required to state more specifically, as nearly as possible, the exact date upon which plaintiff declined to consider such proposition, and the date upon which the said American Wood Pipe Company undertook and agreed as therein alleged.

II.

Referring to Paragraph V, that the plaintiff shall set forth therein whether the contract or order therein referred to was oral or in writing, and if not in writing, shall set forth therein a copy of same.

III.

Referring to the last five and one-half lines of Paragraph VI, that the plaintiff shall set forth therein the items and amounts covered by said "all other obligations of indebtedness to it of said Pipe Company."

IV.

Referring to Paragraph IX, that the plaintiff shall set forth [27] therein a true and correct itemized statement of the items and amounts of said loss or damage totalling Thirty-seven Hundred Fifty-two and 50/100 Dollars.

In the event the foregoing motion, or any part thereof, is denied, the defendant moves in the alternative that the plaintiff shall furnish the defendant

with a bill of particulars, setting out such information as therein sought to have set forth.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant,  
412 Dexter Horton Building,  
Seattle, Washington.

Filed Oct. 1, 1930. [28]

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[Title of Court and Cause—No. 8176.]

ORDER ON DEFENDANT'S MOTION TO  
MAKE MORE DEFINITE AND CERTAIN  
AND DEMURRER SUSTAINING SAID  
MOTION IN PART, DENYING THE BAL-  
ANCE, AND OVERRULING DEMURRER.

This cause having heretofore come on regularly for argument upon the motion of the defendant to require the plaintiff to make its complaint more definite and certain and upon the demurrer of the defendant to the plaintiff's complaint herein, Henry Elliott, Jr., and Scott Z. Henderson of Henderson, Carnahan & Thompson, appearing for the defendant and in support of such motion and demurrer, and F. D. Metzger of Hayden, Langhorne & Metzgar, appearing for plaintiff in opposition thereto, and after oral argument the Court having taken the matter under advisement and briefs having been submitted by both parties and duly considered by

the Court and the Court having heretofore filed its memorandum ruling on said motion and demurrer and being now duly advised in the premises doth now and hereby in accordance with such memorandum rulings, ORDER, as follows:

1. That Paragraphs I and II of the defendant's motion to make more definite and certain be and the same are hereby severally denied. [29]

2. That Paragraphs III and IV of said motion to make more definite and certain be and the same are hereby severally granted.

3. That the defendant's demurrer to said complaint be and the same is hereby overruled.

4. That the plaintiff be and it is hereby allowed ten days from the date of the entry of this order within which to file an amended complaint.

Done in open court this 18th day of March, 1931.

EDWARD E. CUSHMAN,  
District Judge.

Plaintiff excepts. Exception allowed.

EDWARD E. CUSHMAN,  
Dist. Judge.

Okeh as to form.

HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant.

[Endorsed]: Filed Mar. 18, 1931. [30]



[Title of Court and Cause—No. 8176.]

EXCEPTIONS OF DEFENDANT TO ORDER  
OVERRULING DEMURRER AND PAR-  
TIALY DENYING MOTION TO MAKE  
MORE DEFINITE AND CERTAIN.

Comes now The Aetna Casualty and Surety Com-  
pany, a corporation, defendant herein, and excepts  
to the order of the Court on file herein on its mo-  
tion to make more definite and certain and upon its  
demurrer, in so far as said order denies Paragraph I  
of this defendant's motion to make more definite  
and certain and in so far as said order overrules  
the demurrer of this defendant to the complaint.

Dated, this 23d day of March, 1931.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant.

The foregoing exceptions were presented in open  
court and are by the Court allowed.

Dated, this 23d day of March, 1931.

EDWARD E. CUSHMAN,  
District Judge.

[Endorsed]: Filed Mar. 23, 1931. [31]

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[Title of Court and Cause.]

AMENDED COMPLAINT.

Comes now the plaintiff herein and as its amended

complaint and for cause of action against the defendant, shows and alleges as follows, to wit:

I.

That at all the times hereinafter mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the United States relative to national banks, having its principal place of business in Tacoma, in Pierce County, Washington, where it has been and is transacting a general banking business.

II.

That the defendant, The Aetna Casualty and Surety Company, at all the times hereinafter mentioned was and now is a foreign corporation, duly authorized to act as surety and to write insurance in the State of Washington, and having an office for the transaction of business, and where it was and is engaged in the transaction of business in Tacoma, in Pierce County, Washington; and that at all of said times P. V. Ceasar was and now is an agent of said defendant corporation, duly authorized and licensed to solicit and procure insurance [32] to be written by said company and was and now is a resident vice-president of said company, fully authorized and empowered to sign and execute on behalf of said defendant corporation any and all bonds and undertakings, including bonds of the kind and character hereinafter described; and that W. H. Van Horn was at all times hereinafter mentioned a resident assistant secretary of said defendant corporation, fully authorized and empowered

### 34    *The Aetna Casualty & Surety Company*

to affix the seal of said company to and attest on behalf of said company any and all bonds and undertakings.

#### III.

That American Wood Pipe Company is a corporation organized and existing under and by virtue of the laws of the State of Washington and at all the times hereinafter mentioned up to April 19, 1929, was doing business at Tacoma, in Pierce County, Washington, and maintaining there a factory for the manufacture and sale of wood pipe and other wood products and for the needs of such business was required from time to time to borrow large sums of money from the plaintiff, and in connection with such borrowings did for a valuable consideration on or about the 8th day of August, 1921, execute and deliver to the plaintiff its General Loan and Collateral Agreement, a copy of which is attached to plaintiff's original complaint herein, marked Exhibit "A" and by this reference made a part hereof to all intents and purposes as fully as though set out herein at length.

That at all times since August 8th, 1921, said General Loan and Collateral Agreement has been and is in full force and effect, and by the terms thereof any security of whatsoever kind or nature furnished by said American Wood Pipe Company to the plaintiff for any of its indebtedness could be [33] and is held by the plaintiff not only as security for the particular indebtedness for or in connection with which the same was pledged, hypothecated or created, but also for any and all other

indebtedness, obligation or liability of said Pipe Company to the plaintiff how or whensoever created, incurred and/or evidenced.

#### IV.

That prior to January 21, 1929, said American Wood Pipe Company, being in need of financial assistance to enable it to continue in business and in operation and to enable it to execute and fill orders that might be received and accepted, requested the plaintiff to make from time to time advances against the earnings of orders that might thereafter be taken for execution, and the plaintiff declined to consider or entertain any such proposition and refused to agree to make any such loans or advances unless and until it should be furnished with a bond with an acceptable surety company as surety, guaranteeing to it the existence and *bona fides* of each such order and that the same would be filled and executed according to its terms and indemnifying it against any loss or damage which might result from nonfulfillment of the order according to its terms, and that to procure the necessary loans and advances, said American Wood Pipe Company undertook and agreed to provide such bond in connection with each such loan thereafter applied for.

#### V.

That thereafter and on January 21, 1929, in accordance with the basis of operation theretofore discussed, said American Wood Pipe Company applied to the plaintiff for a loan of \$3,375.00 against the future earnings of an alleged contract [34] be-



tween said Pipe Company and Twin Harbors Lumber Company, which latter was then and still is a wholly solvent corporation; said loan being applied for to enable said Pipe Company to continue in business and to carry out such order; and to obtain the loan or advance thus applied for said Pipe Company executed and delivered to the plaintiff an assignment of the proceeds or earnings of an alleged contract with Twin Harbors Lumber Company, copy of which assignment is annexed to plaintiff's complaint herein, marked Exhibit "B" and by this reference made a part hereof as fully and to all intents and purposes as though set out herein at length; and contemporaneously therewith and as part of the same transaction, furnished and delivered to the plaintiff a bond duly executed by it as principal and the defendant, The Aetna Casualty and Surety Company, as surety, in the penal sum of \$4,000.00, copy of which bond is annexed to plaintiff's complaint herein, marked Exhibit "C" and by this reference made a part hereof as fully and to all intents and purposes as though set out herein at length.

That said bond was executed, issued and delivered, by the defendant herein for a valuable consideration and with knowledge and intent that it would be delivered to the plaintiff an obligee named therein, as a basis of credit and as indemnity against any loss which the plaintiff might sustain by reason of the failure of the said American Wood Pipe Company to perform the contract hereinabove and in said bond referred to and described according to the

terms thereof and with intent and knowledge that the plaintiff should and would rely thereon for such indemnity and for the truth of the facts in said bond recited as to the existence, nature and terms of the [35] contract described.

## VI.

That the plaintiff believing the recitals of said bond as to the existence, nature and terms of said contract to be true, and relying thereon and upon the indemnity thereby agreed and intended to be provided, accepted said bond and the assignment of the proceeds of the contract therein referred to, and so believing and relying, paid a valuable consideration for such assignment, to wit, by loaning or advancing to said American Wood Pipe Company the sum of \$3,375.00, which loan or advance was evidenced by the promissory note of said American Wood Pipe Company then contemporaneously made, executed and delivered by said Pipe Company to this plaintiff, copy of which note is annexed to plaintiff's complaint herein, marked Exhibit "D" and by this reference made a part hereof as fully and to all intents and purposes as though set out herein at length; that except for said recitals in said bond and representations thereby made by the defendant herein to the plaintiff, plaintiff would not have made said loan or advance nor accepted said assignment which was taken as security not only for the moneys advanced and loaned to the American Wood Pipe Company contemporaneously with the acceptance of the assignment and bond, but also in accordance with the terms of the General Loan and Collateral

### 38    *The Aetna Casualty & Surety Company*

Agreement hereinabove referred to for any and all other obligations or indebtedness to it of said Pipe Company, on which there is due and unpaid an amount largely in excess of the penalty of said bond; that an itemized statement of such other obligations or indebtedness upon which there now remains unpaid the sum of \$101,869.87, is hereto annexed, marked Exhibit "E" and made a part hereof [36] by this reference as fully and to all intents and purposes as though set out herein at length.

#### VII.

That said American Wood Pipe Company wholly failed and neglected to carry out and perform said alleged contract with said Twin Harbors Lumber Company in said bond described and referred to, either within the time specified in said contract or at all; and as plaintiff is informed and believes there was in truth and in fact no such written order from or contract with said Twin Harbors Lumber Company and that the recitals in said bond and the representations thereby made by the defendant herein as to said alleged contract where wholly false.

#### VIII.

That thereafter and on or about the 19th day of April, 1929, said American Wood Pipe Company became wholly insolvent, suffered a receiver to be appointed of its business and affairs and to wind up the same, and that no part of the loan or advance made by this plaintiff in reliance upon said false and fraudulent representations was repaid by said American Wood Pipe Company prior to said re-



ceivership or has been since or will hereafter be repaid by said receiver, and that no part of the proceeds of the alleged contract so assigned to this plaintiff has been or will be paid to it.

### IX.

That by reason of the matters and things hereinbefore alleged plaintiff sustained loss and damage in the sum of \$3,673.50, being the net amount which if said order or contract had been performed would have been paid to it under and according to the terms of the contract or invoice, the [37] proceeds of which were assigned to the plaintiff, as hereinbefore alleged, after deduction of the 2% discount and 5% commission allowed by said invoice; that Twin Harbors Lumber Company sustained no loss or damage and has not asserted and is not asserting any claim of loss or damage under or against said bond.

### X.

That plaintiff has heretofore demanded of the defendant payment of its said loss and damage in accordance with the intent and tenor of said bond and the defendant has heretofore generally denied any and all liability whatsoever upon said bond and has wholly failed and refused to pay to the plaintiff its said loss or any part thereof and accordingly there is now due and owing to the plaintiff from the defendant the full sum of \$3,673.50, with interest at 6% per annum from January 21, 1929, until paid.

WHEREFORE, plaintiff prays judgment against the defendant for said sum of \$3,673.50, with inter-



# 40    *The Aetna Casualty & Surety Company*

est at 6% per annum from January 21, 1929, until paid, and for its costs and disbursements herein caused to be expended.

HAYDEN, LANGHORNE & METZGER,  
Attorneys for Plaintiff,  
Office and Post Office Address: 523 Tacoma Building, Tacoma, Washington. [38]

## EXHIBIT "E."

Detail of Obligations or Indebtedness of American  
Wood Pipe Company to The National Bank of Tacoma.

Note No.	Date.	Character of Note.				Amount.
66732	6- 2-28	Assnd.	Inv.	on Grays Harbor Pulp Co.		\$2,800.00
66799	6- 5-28	"	"	"	"	3,400.00
66860	6- 6-28	"	"	"	James H. Coyne	1,425.68
66861	6- 6-28	"	"	"	Grays Harbor Pulp Co.	3,075.00
66902	6- 7-28	"	"	"	"	2,900.00
66939	6- 8-28	"	"	"	"	2,975.00
67027	6-11-28	"	"	"	"	3,075.00
67162	6-13-28	"	"	"	James H. Coyne	2,713.93
67524	6-21-28	"	"	"	Grays Harbor Pulp Co.	1,910.00
67709	6-25-28	"	"	"	James H. Coyne	5,400.00
67757	6-26-28	"	"	"	Grays Harbor Pulp Co.	4,000.00
68056	7- 3-28	"	"	"	James H. Coyne	4,500.00
68342	7-11-28	"	"	"	"	4,500.00
68588	7-19-28	"	"	"	Grays Harbor Pulp Co.	2,710.00
69112	8- 2-28	"	"	"	James H. Coyne	3,160.00
70138	8-30-28	"	"	"	"	2,585.00
71027	9-22-28	"	"	"	American Dist. Steam Co.	730.00
71084	9-24-28	"	"	"	"	1,315.00
71419	10- 3-28	"	"	"	Fred L. Harris	700.00
71476	10- 4-28	"	"	"	Utah Lake District Co.	525.00
71704	10-10-28	"	"	"	Washington B. R. & Lime Co.	180.00
72172	10-23-28	"	"	"	American Dist. Steam Co.	1,180.00
72522	11- 1-28	"	"	"	"	1,320.00

Note No.	Date.	Character of Note.		Amount.
72804	11- 8-28	Assnd.	Inv. on Dept. Fisheries & Game	\$1,025.00
72877	11-11-28	"	" " Smuggler Mining Co.	1,425.00
72945	11-13-28	"	" " " "	2,325.00
73009	11-14-28	"	" " " "	1,800.00
73116	11-16-28	"	" " Wenatchee Vinegar Co.	590.00
[40]				
73256	11-20-28	"	" " Wenatchee Vinegar Co.	1,220.00
73257	11-20-28	"	" " Tum a Lum Lumber Co.	2,680.00
73317	11-30-28	"	" " H. A. Browning Lumber Co.	6,585.00
73432	11-23-28	"	" " " "	340.00
73747	12- 3-28	"	" " American Dist. Steam Co.	1,920.00
73813	12- 3-28	"	" " A. B. Fosseen & Co.	3,230.00
73916	12- 5-28	"	" " American Ldy Machine Co.	3,750.00
73980	12- 7-28	"	" " Western Union Telegraph Co.	260.00
74050	12-10-28	"	" " H. A. Browning Lumber Co.	180.00
74148	12-11-28	"	" " " "	530.00
74187	12-12-28	"	" " U. S. Indian Irrig. Service	6,800.00
74267	12-14-28	"	" " Twin Harbors Lumber Co.	3,100.00
74357	12-17-28	"	" " Town of Goldendale	2,035.00
74418	12-18-28	"	" " Twin Harbors Lumber Co.	3,325.00
74464	12-19-28	"	" " Taylor Building Co.	235.00
74512	12-20-28	"	" " Twin Harbors Lumber Co.	3,590.00
74601	12-22-28	"	" " H. A. Browning Lumber Co.	2,090.00
74673	12-24-28	"	" " Continental Pipe Mfg. Co.	220.00
74708	12-26-28	"	" " H. A. Browning Lumber Co.	1,390.00
74820	12-29-28	"	" " Manton & Hart	3,300.00
74947	1- 2-29	"	" " Twin Harbors Lumber Co.	3,270.00
74980	1- 3-29	"	" " " "	2,235.00
75061	1- 5-29	"	" " Henry D. Davis Lumber Co.	925.00
75063	1- 5-29	"	" " Twin Harbors Lumber Co.	2,000.00
75107	1- 7-29	"	" " Frank Porter Lumber Co.	1,870.00
75146	1- 8-29	"	" " Rainier Pulp & Paper Co.	175.00
75147	1- 8-29	"	" " Wheeler Lbr. Bridge Sup. Co.	2,010.00
75187	1- 9-29	"	" " Ira S. Harding	1,830.00
75245	1-10-29	"	" " Twin Harbors Lumber Co.	2,135.00
75256	1-11-29	"	" " Midland Lbr. & Mfg. Co.	325.00

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Note No.	Date.	Character of Note.			Amount.
75305	1-12-29	Assnd.	Inv. on	Weyerhaeuser Tbr. Co.	\$185.00
[41]					
75340	1-14-29	"	"	" National Sugar Mfg. Co.	17,100.00
75395	1-15-29	"	"	" Wheeler Lbr. Bridge Sup. Co.	1,820.00
75396	1-15-29	"	"	" Twin Harbors Lumber Co.	3,545.00
75470	1-17-29	"	"	" American Car & Foundry Co.	1,360.00
75471	1-17-29	"	"	" Twin Harbors Lumber Co.	1,350.00
75523	1-19-29	"	"	" Town of Orting	2,790.00
	1-21-29	Demand Note			500.00
75585	1-21-29	Assnd.	Inv. on	Twin Harbors Lumber Co.	840.00
75617	1-22-29	"	"	" Wheeler Lbr. Bridge & Sup. Co.	1,290.00
75668	1-23-29	"	"	" Ralph L. Smith Lbr. Co.	2,215.00
75698	1-24-29	"	"	" Wheeler Lbr. Bridge & Sup. Co.	1,970.00
75788	1-26-29	"	"	" U. S. Indian Irrig. Service	1,690.00
75822	1-28-29	"	"	" E. F. Benson	1,025.00
75823	1-28-29	"	"	" Radph L. Smith Lbr. Co.	1,085.00
75830	1-29-29	"	"	" Town of Toledo	2,160.00
75928	1-31-29	"	"	" Wheeler Lbr. Bridge & Sup. Co.	400.00
75961	2- 1-29	"	"	" "	1,710.00
75987	2- 2-29	"	"	" Oregon Casket Co.	1,000.00
76038	2- 4-29	"	"	" Ralph L. Smith Lbr. Co.	3,300.00
76039	3- 4-29	"	"	" Rainier Pulp & Paper Co.	425.00
76069	2- 5-29	"	"	" Twin Harbors Lumber Co.	2,925.00
76127	2- 6-29	"	"	" "	1,275.00
76187	2- 7-29	"	"	" "	2,400.00
76207	2- 8-29	"	"	" Ralph L. Smith Lbr. Co.	3,050.00
76244	2- 9-29	"	"	" Wheeler Lbr. Bridge & Sup. Co.	2,800.00
76300	2-11-29	"	"	" Twin Harbors Lumber Co.	2,000.00
76354	2-13-29	"	"	" "	2,540.00
76437	2-15-29	"	"	" Rainier Pulp & Paper Co.	3,600.00
76544	2-18-29	"	"	" Wheeler Lbr. Bridge & Sup. Co.	1,515.00
76545	2-18-29	"	"	" Foster-Isaacson Co.	1,620.00
76571	2-19-29	"	"	" Twin Harbors Lumber Co.	3,075.00
[42]					
76618	2-10-29	"	"	" Wheeler Lbr. Bridge & Sup. Co.	2,125.00
76648	2-21-29	"	"	" Twin Harbors Lumber Co.	1,530.00
76683	2-23-29	"	"	" "	1,335.00

Note No.	Date.	Character of Note.		Amount.
76766	2-25-29	Assnd.	Inv. on Rainier Pulp & Paper Co.	\$3,850.00
76848	2-27-29	"	" " Ralph L. Smith Lumber Co.	2,050.00
76901	2-28-29	"	" " Rainier Pulp & Paper Co.	3,240.00
76981	3- 2-29	"	" " Modern Electric Water Co.	1,550.00
76982	3- 2-29	"	" " Consumers Co.	155.00
76983	3- 2-29	"	" " Ellensburg Gas & Water Co.	530.00
77038	3- 4-29	"	" " St. Paul & Tacoma Lbr. Co.	340.00
77054	3- 5-29	"	" " Oroville Tonasket Irrig. Co.	630.00
77055	3- 5-29	"	" " Tacoma Land & Imp. Co.	100.00
77091	3- 5-29	"	" " C. E. Blackwell Co.	205.00
77092	3- 5-29	"	" " Federal Mining Co.	1,800.00
77128	3- 6-29	"	" " Lord & Bushnell Co.	1,415.00
77177	3- 7-29	"	" " Grants Pass Irrig. Dist.	1,560.00
77199	3- 8-29	"	" " D. P. Slater	300.00
77200	3- 8-29	"	" " Rainier Pulp & Paper Co.	285.00
77227	3- 9-29	"	" " Little River Redwood Co.	1,275.00
77322	3-11-29	"	" " "	955.00
77323	3-11-29	"	" " Sunny Point Packing Co.	635.00
77349	3-11-29	"	" " Department of Interior	355.00
77403	3-13-29	"	" " Wenatchee Heights Rec. Dist.	970.00
77465	3-14-29	"	" " Des Chutes River Saw Mill	640.00
77515	3-15-29	"	" " Lord & Bushnell Co.	1,310.00
77553	3-16-29	"	" " Olympia G. & C. Co.	910.00
77669	3-19-29	"	" " Lockwood Canady Irrig. Dist.	925.00
77670	3-19-29	"	" " J. Bouska & Son	260.00
77671	3-19-29	"	" " Mutual Irrigation Co.	450.00
77672	3-19-29	"	" " Orondo Water & Land Co.	615.00
77710	3-20-29	"	" " Duncanson & Harrilson	1,385.00
[43]				
78088	3-23-29	"	" " Northern Pacific Ry. Co.	65.00
78089	3-29-29	"	" " Country Homes Water Co.	375.00
78175	4- 2-29	"	" " City of Centralia	355.00
78241	4- 4-29	"	" " Dept. of Int. Indian Service	570.00
78242	4- 4-29	"	" " Mackey & Skinner	1,545.00
78243	4- 4-29	"	" " Clemons Logging Co.	240.00
78290	4- 5-29	"	" " F. Cushing Moore	1,540.00



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Note No.	Date.	Character of Note.		Amount.
78291	4- 5-29	Assnd.	Inv. on Henry Lbr. Co.	\$1,390.00
78378	4- 8-29	"	" " Morris Hardware Co.	1,600.00
78379	4- 6-29	"	" " Western Public Service Co.	290.00
78422	4- 9-29	"	" " White Mfg. Co.	275.00
78423	4- 9-29	"	" " Town of Steilacoom	245.00
78453	4- 9-29	"	" " Bay View Packing Co.	1,245.00
78473	4-11-29	"	" " Tacoma Land & Imp. Co.	120.00
78474	4-11-29	"	" " Potlatch Lumber Co.	130.00
78530	4-12-29	"	" " Intermountain Water & Pwr. Co.	250.00
78531	4-11-29	"	" " Town of Coulee City	90.00
78542	4-13-29	"	" " City of Forsyth	1,890.00
78589	4-15-29	"	" " R. M. Johnston	440.00
78639	4-16-29	"	" " American Smelting & Rfg. Co.	725.00
78675	4-17-29	"	" " Tacoma Country & Golf Club	320.00
78676	4-17-29	"	" " Country Homes Water Co.	95.00
78681	4-17-29	"	" " Gailbrath Bros.	75.00
78682	4-17-29	"	" " Boise Payette Lumber Co.	320.00
75618	1-22-29	"	" " City of Bremerton	220.00
75927	1-31-29	"	" " Twin Harbors Lumber Co.	975.00
Total .....				\$251,429.61

[Endorsed]: Filed Apr. 1, 1931. [44]

[Title of Court and Cause—No. 8176.]

### ANSWER TO AMENDED COMPLAINT.

Comes now the defendant, and for its answer to the amended complaint herein, admits, denies and alleges:

#### I.

Answering Paragraph Two, the defendant admits each and every allegation therein contained, save and except that it denies that said P. V. Caesar and W. H. Van Horn were authorized to sign, execute

or attest any of all bonds and undertakings on behalf of the defendant.

## II.

Answering Paragraph Three, the defendant alleges that it has not sufficient knowledge or information to form a belief as to the truth or falsity of the allegations as to how long said general loan and collateral agreement has been in effect, and whether the same is now in effect, and as to whether any security furnished by said Pipe Company to the plaintiff could be held as security for any indebtedness of said Pipe Company to the plaintiff, and therefore, denies said allegations on information and belief in order to put the plaintiff on proof thereof. [45]

## III.

Answering Paragraph Four, the defendant denies each and every allegation therein contained.

## IV.

Answering Paragraph Five, the defendant denies each and every allegation therein contained, save and except that on or about the 21st day of January 1929, the defendant, as surety, executed and delivered to the American Wood Pipe Company said bond, a copy of which is attached to the complaint and marked Exhibit "C."

## V.

Answering Paragraph Six, the defendant denies each and every allegation therein contained, save and except that as to the allegations that the plain-

tiff loaned to the American Wood Pipe Company the sum of \$3,375.00 at said time, and took said note therefor, and as to whether there is due and unpaid any sum to the plaintiff from the American Wood Pipe Company, the defendant alleges that it does not have sufficient information or knowledge to form a belief as to the truth or falsity of said allegations, and therefore denies the same in order to put the plaintiff upon its proof.

## VI.

Answering Paragraph Seven, the defendant denies each and every allegation therein contained, save and except as to said allegation as to the non-existence of the said written order, and alleges that it has not sufficient knowledge or information to form a belief as to the truth or falsity of said allegation, and therefore denies the same in order to put the plaintiff upon its proof, and the defendant further specifically denies that the defendant made any representations [46] whatsoever in or concerning said bond.

## VII.

Answering Paragraph Eight, the defendant denies each and every allegation therein contained, save and except that said American Wood Pipe Company became insolvent, and that on or about the 19th day of April, 1929, a Receiver was appointed to wind up and liquidate its business and affairs, and as to said allegation that said Wood Pipe Company has repaid or will repay any part of said alleged loan, the defendant does not have sufficient knowledge or information to form a belief as to the truth

or falsity of said allegations, and therefore denies the same in order to put the plaintiff upon its proof.

### VIII.

Answering Paragraphs Nine and Ten the defendant denies each and every allegation therein contained, save and except that the plaintiff did make a demand upon the defendant under said bond.

For a further answer and by way of a first affirmative defense, defendant alleges that the plaintiff was a party obligee to said bond and at all times knew, or by the exercise of reasonable diligence should have known, the facts as to the existence or nonexistence of the order referred to in said bond, and by virtue of such knowledge and the recitals contained in said bond, and the acceptance of said bond by the plaintiff containing the recitals therein, the plaintiff represented that such an order was in existence and is now estopped to deny such recitals and representations. [47]

For a further answer and by way of a second affirmative defense, the defendant alleges that if the plaintiff loaned to the American Wood Pipe Company the said sum of \$3,375.00 on the 21st day of January, 1929, that the said loan was not made for the purpose of enabling the American Wood Pipe Company to perform the contract or order referred to in said bond, and that the money so loaned was not, nor any part thereof, used for that purpose, and that said loan was made as a general loan and in reliance upon other securities held by the plaintiff, and belonging to the said American Wood Pipe



Company in a large amount, the exact character and amount being within the knowledge of the plaintiff, and that the plaintiff has at no time advanced to the American Wood Pipe Company any sum of money whatsoever to be used, and which was used, in the filling of said contract or order.

For a further answer and by way of a third affirmative defense, the defendant alleges that all of the representations and agreements alleged by the plaintiff to have been made by the defendant concerning the existence of orders or contracts, or that said bond was given as a basis of credit and as indemnity against any loss that might be sustained by the plaintiff on account of loans or advances, were oral representations and agreements which the plaintiff now claims that the defendant made, and on the basis of such alleged oral representations and agreements the plaintiff seeks to hold the defendant for the debt, default or misdoings of the American Wood Pipe Company, and that said alleged representations and agreements are therefore in violation of the statute of frauds, because they are not in writing, and are therefore, void and of no [48] force and effect.

WHEREFORE, having fully answered the amended complaint herein, the defendant prays that the above-entitled action be dismissed, and that it

have judgment for its costs and disbursements herein.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant,  
1414 Puget Sound Bank Bldg., Tacoma, Wash-  
ington.

[Endorsed]: Filed Apr. 8, 1931. [49]

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[Title of Court and Cause—No. 8176.]

### REPLY.

Comes now The National Bank of Tacoma, plain-  
tiff herein, and for reply to the defendant's answer  
to plaintiff's amended complaint denies generally  
any and all affirmative matter contained in such  
answer, and further:

#### I.

For reply to the so-called first affirmative defense  
contained in said answer, denies the same and each  
and every allegation therein contained, and alleges:  
That plaintiff relied on the bond in the complaint  
herein described and upon the recitals therein con-  
tained; that the defendant knew and intended that  
the plaintiff should rely thereon for the truth of the  
recitals therein contained and for the existence of  
the order referred to and the terms thereof, and  
knew that the bank did so rely thereon, and is  
estopped, not only by reason of the said bond and

the representations therein contained, but also by its conduct in the premises, to question or deny or base any defense upon the fact with respect to the order for materials being otherwise than as stated in said bond.

II.

Replying to the second affirmative defense, plaintiff [50] denies each and every allegation therein contained and the whole thereof.

III.

Replying to the third affirmative defense, plaintiff denies each and every allegation therein contained and the whole thereof.

WHEREFORE, having made full reply, plaintiff prays judgment in accordance with the prayer of its complaint herein.

HAYDEN, LANGHORNE & METZGER,

Attorneys for Plaintiff,

Office and Post Office Address:

523 Tacoma Building, Tacoma, Wash.

Filed May 5, 1931. [51]

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[Title of Court and Cause—No. 8176.]

VERDICT.

We, the jury in the above-entitled action, do find in favor of the plaintiff, The National Bank of Tacoma, a corporation, and against the defendant, The Aetna Casualty and Surety Company, a corporation, in the sum of \$4,244.36, being instructed by the Court so to do.

Dated this 13th day of November, 1931.

A. M. ANGOVE,  
Foreman.

[Endorsed]: Filed Nov. 13, 1931. [52]

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In the District Court of the United States for the  
Western District of Washington, Southern  
Division.

No. 8176.

THE NATIONAL BANK OF TACOMA, a Na-  
tional Banking Corporation,

Plaintiff,

vs.

THE AETNA CASUALTY AND SURETY COM-  
PANY, a Corporation,

Defendant.

### JUDGMENT.

This cause having heretofore come on regularly for trial before the undersigned, plaintiff appearing by its officers and by its attorneys, F. D. Metzger and A. E. Blair, of the firm of Hayden, Langhorne & Metzger, and the defendant appearing by its attorneys, Scott Z. Henderson of the firm of Henderson, Carnahan & Thompson and Henry Elliott, Jr., and a jury having been duly impaneled and sworn, and plaintiff having offered evidence, both oral and documentary in support of its amended complaint and rested, and the defendant having rested its case without the introduction of any testimony;



and the Court having granted plaintiff's motion for a directed verdict in favor of the plaintiff and against the defendant and the jury having duly and regularly returned its verdict pursuant to the instructions of the court, finding in favor of the plaintiff and against the defendant for the sum of \$4,244.36, which verdict was duly received and filed in open court;

And the cause coming on now to be heard upon the application of the plaintiff by and through its said attorneys for judgment upon and in accordance with said verdict, and [53] the court being otherwise duly advised in all the premises DOTH NOW AND HEREBY ORDER AND ADJUDGE that the plaintiff, The National Bank of Tacoma, a national banking corporation, do have and recover judgment of and from the defendant, The Aetna Casualty and Surety Company, a corporation, in the sum of four thousand two hundred forty-four and 36/100 (\$4,244.36) dollars, and for its costs to be taxed herein in the manner provided by law, and that execution issue therefor.

Done in open court this 21st day of November, 1931.

EDWARD E. CUSHMAN,  
Judge.

Copy received Nov. 18, 1931.

HENDERSON, CARNAHAN & THOMP-  
SON,

HENRY ELLIOTT, Jr.,  
Attys. for Defendant.

Defendant excepts to the foregoing judgment and each and every part thereof, which exception is hereby allowed.

EDWARD CUSHMAN,  
Judge.

[Endorsed]: Filed Nov. 21, 1931. [54]

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[Title of Court and Cause—No. 8176.]

ORDER EXTENDING TIME TO AND INCLUDING JANUARY 12, 1932, TO FILE BILL OF EXCEPTIONS.

Upon stipulation of the parties hereto, IT IS ORDERED, that the time in which defendant may serve and file a proposed bill of exceptions herein be and the same is hereby extended up to and including the 12th day of January, 1932.

Done in open court, this 21st day of November, 1931.

EDWARD E. CUSHMAN,  
District Judge.

[Endorsed]: Filed Nov. 21, 1931.

G. O. B. #8, pg. 612. [55]

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[Title of Court and Cause—No. 8176.]

MOTION OF DEFENDANT TO VACATE THE JUDGMENT, SET ASIDE THE VERDICT AND GRANT DEFENDANT A NEW TRIAL.

Comes now the above-named defendant and re-

pectfully moves and petitions this Honorable Court to vacate the judgment, set aside the verdict rendered herein, and entered in favor of the plaintiff and against the defendant, and grant the defendant a new trial herein upon the following grounds and for the following reasons:

### I.

Errors in law occurring at the trial and excepted to at the time by the defendant in, amongst others, the following particulars:

(a) Plaintiff was permitted to introduce in evidence a document dated August 8, 1921, the same being a general collateral trust agreement executed by the American Wood Pipe Company to the plaintiff bank, and to show that the American Wood Pipe Company was indebted to plaintiff in large sums before the bond involved in this case was written.

(b) The plaintiff was permitted to introduce evidence that prior to the writing of the bond in question it was the practice of the Wood Pipe Company to borrow money on bills of lading and assigned invoices, showing goods shipped to its customers.

(c) The plaintiff was further permitted to introduce testimony that sometime in 1928, the Wood Pipe Company made application to the bank for loans on advances against shipments [56] before shipments were actually made, and offered to secure an indemnity bond to guaranty delivery of the goods.

(d) The plaintiff was permitted to offer testi-

mony that the bank officials informed the Wood Pipe Company that the indemnity bond must cover two things; first, that there was a written and enforceable order, and second, the order would be fulfilled according to its terms.

(e) The plaintiff was permitted to offer testimony as to its construction of the bond before it was written.

(f) The plaintiff was permitted to introduce testimony that on December 26, 1928, the bank held similar bonds of the defendant in the sum of \$37,000.00.

(g) The plaintiff was permitted to offer testimony that the plaintiff expected to receive the full amount of the assigned invoice, to wit, \$3,950.00.

(h) The court refused to permit the defendant to show that the claimed advance covered money which the plaintiff itself applied against the overdraft of the Wood Pipe Company at that time, and did not constitute a loan of money.

(i) The plaintiff was permitted to introduce testimony contradicting the recitals of the bond to the effect that there was a written order.

(j) The court should have granted the motion of the defendant for a dismissal of the action at the end of the plaintiff's case.

(k) The court erred in denying defendant's motion for a directed verdict at the end of the plaintiff's case.

(l) The court erred in granting the plaintiff's motion for a directed verdict after the defendant rested.



56    *The Aetna Casualty & Surety Company*

(m) The court erred in directing a verdict in favor of the plaintiff. [57]

(n) The court erred in directing the jury to find a verdict in the sum of \$4,244.36.

WHEREFORE, the defendant prays that this court will review the errors hereinbefore pointed out, and will vacate the verdict and the judgment entered thereon, and grant this defendant a new trial.

HENDERSON, CARNAHAN & THOMP-  
SON,

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,

Attorneys for Defendant,  
412 Dexter Horton Building, Seattle, Washington.

[Endorsed]: Filed Dec. 28, 1931. [58]

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[Title of Court and Cause—No. 8176.]

ORDER DENYING MOTION TO VACATE  
JUDGMENT.

This cause coming on to be heard upon the motion of the defendant to vacate the judgment heretofore entered herein and to grant a new trial, F. D. Metzger of Hayden, Metzger & Blair formerly Hayden, Langhorne & Metzger, appearing on behalf of the plaintiff, and S. Z. Henderson of Henderson, Carnahan & Thompson appearing on behalf of the defendant; and said motion having been submitted without argument and the court being duly advised in the premises

DOTH NOW AND HEREBY ORDER that said motion be and the same is hereby in all respects denied.

Done in open court this 4th day of January, 1932.

EDWARD E. CUSHMAN,  
Judge.

The defendant excepts to the ruling embodied in the foregoing order and its exception is hereby allowed.

EDWARD E. CUSHMAN,  
Judge.

[Endorsed]: Filed Jan. 4, 1932. [59]

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[Title of Court and Cause—No. 8176.]

### ORDER EXTENDING TERM.

This cause being regularly before the court upon the proposed bill of exceptions of the defendant and the proposed amendments of the plaintiff thereto; and it appearing to the court that a judgment of this court in favor of the plaintiff was filed herein on the 21st day of November, 1931, less than ninety days from the time when the next term of this court will commence;

And it further appearing that it is the purpose and intention of the defendant herein to apply to this court for a writ of error to the Circuit Court of Appeals of the Ninth Circuit, and the plaintiff being represented at this hearing by its attorneys, and the defendant being represented at this hearing by its attorneys:

IT IS ORDERED: That this Court will retain jurisdiction over this cause beyond the expiration of the present term of this court for all purposes and particularly for the purpose of settling a bill of exceptions herein, allowing a writ of error herein, and fixing the amount of a cost and supersedeas bond herein, should a writ of error be allowed.

Done in open court, this 30th day of January, 1932.

EDWARD E. CUSHMAN,  
District Judge.

[Endorsed]: Filed Jan. 30, 1932. [60]

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[Title of Court and Cause—No. 8176.]

#### DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the trial of this cause in this court at the July term of 1931, the Honorable Edward E. Cushman presiding, the plaintiff appearing by its counsel, Hayden, Langhorne & Metzgar, Fred G. Metzgar and A. E. Blair, the defendant appearing by its counsel, Henderson, Carnahan & Thompson, Scott Z. Henderson and J. Speed Smith and Henry Elliott, Jr., commencing on November 12, 1931, to wit:

A jury was empanelled and sworn according to law to try the cause.

(Pursuant to oral stipulation the trial court ruled that said cause should be consolidated with causes

numbers 8177 and 8179 between the above named plaintiff and defendant, in the same court, for purposes of trial, for the reason that each of said causes involved a suit between the same parties upon similar bonds.)

Mr. Metzger, of counsel for plaintiff, thereupon made his opening statement to the jury and the defendant, through its counsel, Mr. Henderson, reserved his statement.

Thereupon the plaintiff to sustain the issues upon its part offered testimony of witnesses and documentary evidence as follows:

#### TESTIMONY OF P. V. CAESAR, FOR PLAINTIFF.

P. V. CAESAR, produced as a witness by the plaintiff, being first duly sworn, testified on direct examination: [71]

I live in the city of Tacoma, have lived here for 42 years. I am in the insurance business. I sign bonds for the Aetna Casualty and Surety Company as resident assistant vice-president and resident assistant secretary. I was such in 1928 and 1929, signing bonds of various kinds for that company. I was associated with H. E. Anderson & Company at that time, which was the general agency of the company.

(Certified copy of charter of the defendant company marked Plaintiff's Exhibit 1 admitted in evidence.

Certified copy of authority of Mr. Caesar as resi-



(Testimony of P. V. Caesar.)

dent vice-president marked Plaintiff's Exhibit 2, admitted in evidence.

Certified copy of certificate of authority of the state insurance commission to the defendant company marked Plaintiff's Exhibit 3, admitted in evidence).

A. A. Goetz had the title of resident assistant secretary for the defendant company. She was an employee of R. E. Anderson and Company.

(Certified copy of power of attorney of A. A. Goetz marked Plaintiff's Exhibit 4 admitted in evidence.)

W. H. Van Horn is vice-president of R. E. Anderson Company, and sometimes signs as resident vice-president. He also signed as resident assistant secretary.

(Certified copy of powers of attorney to Mr. Van Horn marked Plaintiff's Exhibits 5 and 6 admitted in evidence.)

I could not state precisely, but I have been agent or attorney in fact for the Aetna Casualty and Surety Company for about 14 years,—all the time in the city of Tacoma. I am acquainted with the National Bank of Tacoma and its officers. I know Mr. Mattison and Mr. Pierce. I do not recollect how long. I knew them for many years prior to 1928. In January, 1929, the National Bank of Tacoma had its offices on 12th and Pacific, where they are now, back of this courtroom on Pacific Avenue. I do not know what their charter is, but I presume they were engaged exclusively in the

(Testimony of P. V. Caesar.)

banking business at that time, receiving money on deposits and loaning money and effect— [72] exchange of money,—general banking business.

Document handed to me is bond executed by me as assistant vice-president and by Miss Goetz. I haven't got the application upon which this bond was issued, but I presume it is there.

(Bond referred to marked Plaintiff's Exhibit 7 admitted in evidence.)

Yes, sir, that is the application upon which this bond was issued. I could not state where the application was made up, I did not make it up. I could not state when I first saw it. In all probability I saw it before I executed it. I would not swear to that. I cannot state specifically on any one bond where it was executed, but they practically all were executed in my office. The applications were not executed in there. The typewriting was done in my office, but the bonds were not necessarily signed there. Usually Mr. Morell came for the bonds and he and Mr. Happy signed and executed them on behalf of the American Woodpipe Company. I never saw the execution of the bond, itself, so I would not want to say, but I know the application—Mr. Happy's office is very close to R. E. Anderson, but has nothing to do with it. The application for the bond itself was usually made up on telephone information which came from the American Woodpipe Company to our office. The National Bank of Tacoma had nothing to do with the application for the bond. I do not know

(Testimony of P. V. Caesar.)

anything about what their connection was I did not know they had any part in it. I do not think they made any representations to us for the issuance of any of these bonds. I am trying to remember. I do not think so.

(Application referred to marked Plaintiff's Exhibit 8 admitted in evidence.)

Yes, I executed bond dated January, 15, 1929, at the request of the American Wood Pipe Company. That is my signature and Miss Goetz's signature.

(Bond referred to marked Plaintiff's Exhibit 9 admitted in evidence.)

This is the formal application upon which the bond, Exhibit 9, was issued. [73]

(Application referred to marked Plaintiff's Exhibit 10, admitted in evidence.)

Document bearing date January 21, 1929, purporting to be a bond, was executed by me at request of the American Wood Pipe Company. That is my signature and Mr. Van Horn's signature as Resident Vice-president and Resident Assistant Secretary respectively.

(Bond referred to marked Plaintiff's Exhibit 11, admitted in evidence.)

Document handed me also bearing date January 21, 1929, seems to be the formal application upon which bond, Exhibit 11, was issued.

(Application referred to marked Plaintiff's Exhibit 12, admitted in evidence.)

All of these three bonds (including bonds in causes numbers 8177 and 8179) were written by my

(Testimony of P. V. Caesar.)

company by me as agent and attorney-in-fact at the request of the American Wood Pipe Company. It is impossible for me to state on an individual bond, but as a general rule Mr. Morrill came in and said he had a small supply contract, and amounted to three thousand, four thousand or two thousand, whatever the amounts might be, and would like a bond that afternoon. He gave us the data, and the data was taken over the telephone, stating just what the order was, and when Mr. Morrill came up, the bond would be ready for him, the application was ready. He would take the application out and get the corporation seal on it and sign it and bring it back and the bond would be handed to him. That is as far as I know about it. The data on which the recital in the bond was made was on information supplied by Mr. Morrill, or by his office, either oral or over the telephone, and the effect of it was that he had some kind of a contract to furnish material to somebody.

We wrote a supply bond for him. Yes, we wrote that bond, based on the information that he furnished in that way. Certainly I knew The National Bank of Tacoma was not in the business of dealing in lumber. No, sir, I have no memorandum or memoranda on which our office made up either of these three [74] bonds, except what you have there. There is no doubt there were notes by the stenographer who took these orders over the telephone, but we haven't got them. We never preserve notes of that kind as a rule. The ordinary practice was the same in all of these cases. Mr.



(Testimony of P. V. Caesar.)

Morrill would either come in and make a statement that he had such an order, or it would be phoned in by him or someone from his office. I had not left standing orders with my office to prepare these bonds and these applications whenever that information came from Mr. Morrill. The bonds were generally referred to me before they were executed. I would not say we were issuing bonds every day, but quite frequently.

After they were executed Mr. Morrill took them. I do not know what he did with them positively. I did not see him, but I think he took them to the National Bank of Tacoma, I am not sure. Before I executed any of these bonds I presumed they would be taken to Mr. Morrill to the National Bank of Tacoma. I did not know it as a positive certainty. I executed them with the idea and the understanding that is where they would come.

I don't remember the date, but it was sometime in the latter part of December that I had a conversation with Mr. R. R. Mattison and Mr. G. T. Pierce, vice-president and either assistant cashier or assistant vice-president of the National Bank of Tacoma, regarding bonds that we were issuing for the American Wood Pipe Company, in which the National Bank of Tacoma was named as obligee. The whole situation was not gone over in that conversation. That conversation was of a general nature. As I recollect, there were two more conversations, one either February 5th or February 6th and the last one just before they closed down, some time in

(Testimony of P. V. Caesar.)

April, I presume, or prior to that, the latter part of March, I think. I haven't got the dates on that. I have positive dates on February tho.

"Q. Now, in this conversation that you had on the 26th of December, or on or about that date, 1928, the bank told you that it had a large number of the bonds that you had issued to the American Wood Pipe Company, did it not? [75]

Mr. HENDERSON.—Object as being incompetent, irrelevant and immaterial, what it was in that conversation about it.

The COURT.—This is before these particular—

Mr. METZGER.—This was just a week before the first of these three bonds were issued.

Mr. HENDERSON.—The bonds speak for themselves, in our opinion.

The COURT.—The Court, without stopping to examine these—

Mr. HENDERSON.—If the Court please, we want to interpose an objection to this as a violation of the parol evidence rule. The bonds speak for themselves.

The COURT.—I will hear from Mr. Metzger. This is the opening of your case, and as I understand from your opening statement, anything in this conversation, if admissible at all, would be in rebuttal, but if there is any ambiguity arises because of these writings, such conversation might have some bearing, but no ambiguity has developed as yet, the Court grasped.

Mr. METZGER.—If your Honor please, the occa-

(Testimony of P. V. Caesar.)

sion for offering this testimony is twofold. First of all, we contend that these bonds are indemnity bonds, and as the Supreme Court of this state has said in construing one of these very bonds and holding it an indemnity bond. It is, in the interpretation of the indemnity contracts, the cardinal rule is that which applies to contracts generally, that is, to ascertain the intention of the parties and to give effect to that intention, if it can be done consistently with legal principles, contracts of indemnity therefore must receive a reasonable construction so as to carry out rather than defeat the purpose for which they were executed. To this end, they should neither on the one hand be so narrow or technically interpreted as to frustrate their obvious design, nor on the other hand so loosely or unartificially as to relieve the obligor from a liability within the scope or spirit of their terms. Where of general import, the contract was one of indemnity, it is the rule that all of the words used therein should be construed to be in harmony with and subservient to the general purpose of the bond. [76]

Now, in this bond, the language is that the American Wood Pipe Company has accepted a written order from the Twin Harbors Lumber Company and or The National Bank of Tacoma.

Your Honor, in passing upon a demurrer in this case referred to a case in Southwestern—in the Southern Reporter, where the Court held that and or, when used in contracts, the words ‘and or,’ when used in contracts as this were subject to be inter-

(Testimony of P. V. Caesar.)

preted as meaning with one of the parties or with the other, or with the both, as the circumstances of the parties at the time the contract was made required.

Now then, we therefore offer this testimony first to show—to explain the ambiguity which Your Honor held existed in the bond.

The COURT.—That language is in the bond?

Mr. METZGER.—Yes, that language is in all these bonds. Secondly, to—under the general rule as to indemnity contracts, to show the situation of the parties so as to determine the extent of the indemnity and right of recovery.

Mr. HENDERSON.—If the Court please, in that case, in the Southern—I don't remember the Court said there was any ambiguity. It said what that 'and-or' meant, that it meant both or either, and there was no ambiguity about it. The Court specifically held, as I remember the case, that there was no ambiguity, and Your Honor referred to that fact in its opinion as to what it meant.

Now, if this was with the Twin Harbors Company or the bank or either of them, the oral testimony I do not believe would be admitted to enlarge the terms of the contract, in any, or enlarge its meanings or would oral testimony change its meaning. It was made by both, and I do not think parol testimony would elucidate any ambiguity in the bonds.

It is true, the bond says it is made with the bank, and the bank contends it was made with the bank.



(Testimony of P. V. Caesar.)

Mr. METZGER.—We do not contend the order was made with the bank. [77]

Mr. HENDERSON.—We admit the bond was made with the bank. Now, I do not see how oral testimony is going to prove it was made with anybody else, and all that ‘and-or’ would be made is who it was made with. We admit in our pleading the bond was made with the bank.

Now, the oral testimony as to what the bond means when we admit it was made with the bank would violate the parol rule. It is admitted this bond was made and issued, and made with the bank. There is no issue in this case as to who the bond ran to. If there was any ambiguity about it, there might be something to explain, but we admit the bond runs to the bank, and the ‘and-or’ if you want to know who it runs to, we admit it runs to the bank and the rest of the bond is perfectly clear. It does not take any oral testimony to explain what that bond means, if you leave the Twin Harbors Lumber Company out.

The COURT.—Objection sustained.

Mr. METZGER.—Now, if your Honor please, I would like to be heard on that question, because this very point will run all the way through, and it has been ruled the other way by the Supreme Court of the state.

Here is the situation: This bond we are trying to discuss—

The COURT.—Perhaps I can clear the matter a little. It seems to me that you are assuming a

(Testimony of P. V. Caesar.)

burden that does not at present rest upon you. If I have not grasped the issues yet, you may renew your offer. It would appear to me that you are undertaking an unnecessary burden.

Mr. METZGER.—Well, will you allow us an exception to your Honor's ruling at this time?

The COURT.—Exception allowed.

If you undertake to show what the language means, the other side will certainly have an opportunity to show it does not mean that, and that—

Mr. METZGER.—(Interrupting.) All I contend is, we have a right to show the circumstances of the parties, and knowledge of the parties, that is, as known to both sides at and prior to the time of the execution of these [78] bonds, as bearing upon the meaning to be ascribed to them, and the construction to be given to them.

The COURT.—If it has any place in the case, it appears to me it is rebuttal and not at this state.

If, in the defense it is claimed that in some way this was not truly an indemnity bond for the entire amount of the order, or invoice, why then you will be heard in rebuttal.

Mr. METZGER.—All right, with that understanding."

Certainly, on January 2, 1929, when the first of these bonds was executed I knew that the National Bank of Tacoma was not buying any material of this kind for itself. I knew it was in the business of loaning money, and loaning money to the American Wood Pipe Company. I knew they were loan-

(Testimony of P. V. Caesar.)

ing money to help them continue in business in the regular way, the same as they always loaned them money. I would not say on the strength of these bonds. I would say on the strength of these orders.

I knew the bank would not make any advances against them unless they had a bond guaranteeing the filling of the order by them. I knew if the American Wood Pipe Company failed to fill the order we would have to do it. (Witness excused.)

#### TESTIMONY OF R. R. MATTISON FOR PLAINTIFF.

R. R. MATTISON, produced as a witness by the plaintiff, being first duly sworn testified on Direct Examination.

I am president of the National Bank of Tacoma. I was vice-president of that institution in 1928 and 1929. I have been with that bank a little over 30 years. It is organized as a National Bank, and has been doing business in the city of Tacoma for many years. In 1928 the bank was doing business with the American Wood Pipe Company. The latter's business was principally the manufacture and sale of wood pipe. To some extent, it manufactured other wood lumber.

The American Wood Pipe Company had been our customers [79] for about seven years. In the course of their dealings they would come to me for loans or accommodation from time to time. They also carried an open or checking account with us.

(Testimony of R. R. Mattison.)

Document dated August 8, 1921, is the property of the bank. The bank acquired it on August 8, 1921. It is executed by the American Wood Pipe Company. It was held as the property of the bank in January, 1929, and is now.

(Over objection of the defendant that the same is incompetent and immaterial, and has no relation to the three bonds in issue, and no bearing upon the issues in this case, the court overruled the objection, admitting said document marked Plaintiff's Exhibit 13 in evidence, to which ruling the defendant excepted and exception allowed. Defendant further objected upon the ground that under the ruling of the State Supreme Court this document has no relation to the bonds in issue and does not refer to them in any way. Objection overruled and exception allowed.)

"Q. Now, Mr. Mattison, what was the general condition or state of dealings between the bank and the American Wood Pipe Company in the summer of 1928?

Mr. HENDERSON.—Objected to as incompetent and immaterial, and has no bearing upon the case. What the condition of the American Wood Pipe Company was at that time has no relation to this particular bond, or either of them.

The COURT.—Objection overruled.

A. I can answer.

Mr. HENDERSON.—Save an exception.

A. I take it the question is as to the financial condition of the company and our relation?



(Testimony of R. R. Mattison.)

Q. Yes, the state of the dealings, the condition of the dealings or the state of relationship between the bank and general relationship between the bank and the American Wood Pipe Company.

The COURT.—Now, I understood your question calling for the amount, if any, that the Wood Pipe Company then owed the bank. [80]

Now, I do not understand the witness will go beyond that, because this collateral agreement, if the Wood Pipe Company did not owe the bank anything, in fact, the bank owed the Wood Pipe Company under collections from other sources, why this liability might be wiped out.

Q. Well, we will just put it that way. What was the condition as to whether the American Wood Pipe Company, in the summer of 1928, was indebted to The National Bank of Tacoma?

A. The company was indebted to us in substantial amount.

Q. Well, in substantial amount, about what do you mean? I do not think the exact figures are material.

A. Well, the loans would run as high as a hundred thousand dollars during that period, I think.

Q. Now, how were these loans made at that time?

Mr. HENDERSON.—Objected to as being incompetent and immaterial. Has no bearing.

The COURT.—Objection overruled. They might inside the collateral agreement or outside of it.

A. The loans made during that period were principally upon assignments of accounts to the bank.

(Testimony of R. R. Mattison.)

Q. What do you mean by assignments of accounts?

A. The company, having received an order—

Mr. HENDERSON.—If the Court please, we want to interpose an objection on the ground there is no issue here involved with reference to the collateral agreement, and this evidence is incompetent, irrelevant and immaterial, in so far as it relates to the issuance of these bonds or the liability under the bonds in question. There is no issue.

The COURT.—Are you satisfied with Mr. Henderson's statement, then?

Mr. METZGER.—No, I am not.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception. [81]

The COURT.—Allowed.

A. Under the procedure which was followed, the company, having received an order, turned out the materials from its factory, which was shipped usually by rail and then would bring to us the assignment of the account which had been created in duplicate. That is, the account assigned to the bank, duplicate copies of the bill of lading evidencing the shipment, and would give its note for the amount of the advance which we would make against the assignment. We then would send to the consignee the bill of lading and a copy of the invoice showing it was assigned to us and request the consignee to make remittance direct to us.

Q. Was there any change in that practice of procedure affected about that time?

(Testimony of R. R. Mattison.)

Mr. HENDERSON.—Objected to as being incompetent, irrelevant and immaterial, and has no bearing on any issue in this case.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

A. Some time during the year 1928, Mr. Morrill, the president of the Wood Pipe Company had come to us to say that if he was to continue in operation he would have to have further help than that which had been given to him theretofore.

Mr. HENDERSON.—We move to strike the answer as not responsive, and entirely hearsay testimony, and not admissible against the defendant.

The COURT.—Motion denied.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

Q. Go ahead.

A. It developed that the proposal that he desired to make to us, that we make the advances before the shipments were actually made on the strength of the orders he had received.

We pointed out to Mr. Morrill that the mere receipt of an order [82] on his part would not create anything that would be collateral in our hands; that the shipment would actually have to be made.

He then suggested that he would be able to secure an indemnity bond, which would guaranty, in effect, the delivery to us of the bill of lading covering the shipments covered by such orders.

Mr. HENDERSON.—If the Court please, we

want to again object to this testimony on the ground it has no relation to the bonds in this case, and therefore incompetent and immaterial, and does not specifically direct anything towards any of the bonds in issue. The Supreme Court of this state, in considering this very question, has held this kind of testimony is not admissible.

The COURT.—Well, as I have understood you, you state there is an indemnity bond?

Mr. HENDERSON.—We are contending it is not an indemnity bond on its face.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—One of the things to be established is the Wood Pipe Company owes the plaintiff. If they don't owe the plaintiff anything, and this is not an indemnity bond, there is nothing to indemnify against.

Mr. HENDERSON.—I understood the issues were at the time the bonds were given, they made a loan at that particular time and if that is what they are suing on, was the loan made at the particular time the bonds were given.

The COURT.—As I understand it, they are suing to recover the amount that would have been paid on their assignment if delivery had been made.

Mr. HENDERSON.—On this particular assignment, not other assignments.

The COURT.—If money is owing from the bank to the Wood Pipe Company, sufficient to wipe out the amount due them on the assignments, or reduce



(Testimony of R. R. Mattison.)

it, they have taken the burden no such condition as that existed on [83] any accounting between them and the Wood Pipe Company, and maybe they did not have to take that burden, but it does not lie in our mouth to object if they do take it.

Mr. HENDERSON.—Our objection is on the ground it is immaterial whether they owed the bank at that particular time or not, in this case, because they are suing for the amount they advanced at that particular time.

The COURT.—The objection will be more persuasive if they made it instead of you making it.

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

A. I think I have said that Mr. Morrill suggested that he would be able to provide an indemnity bond which would in effect guaranty to us that the shipment would be made, and therefore the accounts in our hands would be collectible. We did not want to enter into any arrangement of that kind, because to us it meant simply discounting future operations, and we did not think it would do the company any permanent good.

Mr. HENDERSON.—Move to strike the answer as not responsive to the question.

The COURT.—Well, what the witness thought, what he states he thought, the jury will disregard.

Q. Go ahead. You are talking about this conversation with Mr. Morrill, and relate what the conversation was.

Mr. HENDERSON.—Object to the conversation

(Testimony of R. R. Mattison.)

between the witness and Mr. Morrill as entirely in the absence of the defendant. Has no binding effect upon the defendant and incompetent and immaterial.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

A. I told Mr. Morrill, if any transactions of that kind were to be engaged in, it would be necessary for the indemnity bond to cover two things. First, there was a written and enforceable order. [84]

Mr. HENDERSON.—Object further. It is an attempt to vary the written obligation, itself, by oral testimony.

The COURT.—Objection overruled.

Mr. HENDERSON.—Exception.

The COURT.—Allowed.

A. And second, the order would be fulfilled according to its terms. Mr. Morrill felt sure he could get such a bond.” \* \* \*

A. Mr. Morrill undertook to secure such a bond, and we told him in any event if they were to be used, our attorneys would have to pass on them, and before he came back again he should see our attorneys and produce whatever sort of bond he proposed to use.

A short time subsequent to that, Mr. Morrill came in with the usual assignment of accounts, and instead of bills of lading he tendered us certain bonds, written by the Aetna Company.

Mr. HENDERSON.—We object to any testimony

(Testimony of R. R. Mattison.)

to any bonds except the bonds in issue. We move to strike.

The COURT.—The last answer was made without objection. The Court cannot look far enough into the future to determine what is going to follow. Objection overruled.

Mr. HENDERSON.—Save an exception. I did not know what the witness was going to answer.

The COURT.—Allowed.

A. (Continuing.) That was the first of the series of such transactions.

Q. Now, Mr. Mattison, I do not know that I quite understand you. How did the proposal that was made to you by Mr. Morrill at that time differ or vary from the way in which you had been handling their account or these advances previously?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. [85]

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

A. Theretofore, when the invoices were presented to us, they were accompanied by a bill of lading, which evidenced the actual shipping of the goods.

Q. These invoices, what were they?

A. They were—

Mr. HENDERSON.—Object to them, unless they relate to the particular invoices in question.

The COURT.—Objection overruled.

Mr. HENDERSON.—Exception.

A. (Continuing.) The invoices were for materials sold to the customer.

(Testimony of R. R. Mattison.)

Q. Sold by whom?

A. American Wood Pipe Company, the amount of the invoice and anticipated payment being assigned to us and concurrently with the invoices we would receive the bills of lading, which, of course, evidenced the shipping.

Now, it was proposed those invoices would be presented to us before the shipment was actually made.” \* \* \*

Q. Well, what was it—what was stated by Mr. Morrill, if anything?

Mr. HENDERSON.—Objected to, because it does not relate to the particular bonds in issue, and the particular transaction before the Court.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

A. He represented to us that the advance of money—

Mr. HENDERSON.—We want to object to the representation.

The COURT.—Objection sustained. The witness characterizing it as representation.

Mr. HENDERSON.—We further object to the introduction of the testimony as to the conversation relating to other bonds and these bonds, [86] because it is incompetent, irrelevant and immaterial, and we object to the conversation relating to these bonds because it attempts to vary the bonds by parol testimony.

The COURT.—Objection overruled.



(Testimony of R. R. Mattison.)

Mr. HENDERSON.—Exception.

The COURT.—Allowed.

Q. What, if anything, did Mr. Morrill state regarding the change, why the change should be made?

A. He stated that he would have to have help beyond that theretofore given him in order to be able to continue his operations.

Q. In other words, do I understand you that he had to have advances before the orders were manufactured?     A. That is right.

Q. Instead of after they were manufactured, is that it?     A. Yes.

Q. All right. Now, I think you started to say, and I interrupted you—what happened after this conversation? Was this change in practice or procedure adopted and followed?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial and not tending to prove any issue in this case.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

A. Yes, we accepted the assignments under those circumstances, and bonds, and there followed a series of similar transactions.

Mr. HENDERSON.—We move to strike the last part of the witness' answer as not responsive, and incompetent, irrelevant and immaterial.

The COURT.—Motion denied.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

(Testimony of R. R. Mattison.)

Q. Following that, Mr. Mattison, did you take the matter up in [87] any way with the representative of the defendant surety company? A. Yes.

Q. What? A. Yes.

Q. When?

A. We discussed with Mr. Caesar, the resident vice-president of the company, the situation involved in the handling of these transactions several times.

Mr. HENDERSON.—If the Court please, we object to conversations with the representative of the surety company on the ground that it is incompetent, irrelevant and immaterial and an attempt to introduce parol testimony to vary or alter the terms of a written contract.

The COURT.—The question was one that could be answered by yes or not. The witness went beyond that, but having described the representative as Mr. Caesar, who has already testified—was yours an objection or a motion?

Mr. HENDERSON.—I am objecting.

The COURT.—Objection overruled.

Mr. HENDERSON.—I move to strike that part of the answer of the witness that relates to the conversation with Mr. Caesar.

The COURT.—He has not undertaken to detail the conversation with Mr. Caesar, and will not undertake to do so until another question is asked.

Q. When did the first of these conversations take place, Mr. Mattison?

A. I wouldn't be able to say when the first one took place.

Q. Did you have several? A. Yes.

(Testimony of R. R. Mattison.)

Q. Prior to the 1st of January, 1929?    A. Yes.

Q. Well, calling your attention to December 26, 1926, what was the [88] condition at that date with respect to the indebtedness of the American Wood Pipe Company and the bonds which the bank held?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

A. On December 26, 1928, we had approximately \$37,000.00 worth of bonds of the character that has been discussed.

Q. Now, I don't know—I suppose you are familiar—may I have the bonds in evidence?

The CLERK.—Right here.

Q. I take it you are familiar with the bonds which are here sued on, Exhibits 7, 9 and 11, but I will ask you if the \$37,000.00 which you referred to as bonds held on December 26, 1928, was bonds of similar import to these?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial. A collateral issue which would necessitate going into something which has nothing to do with these bonds.

The COURT.—What is the purpose?

Mr. METZGER.—Simply to—this is all preliminary to show the situation under which these particular bonds were given, if your Honor please. The state of the accounts—

(Testimony of R. R. Mattison.)

Mr. HENDERSON.—If it is material, we have to come into court—the state of the account is between the bank and the Wood Pipe Company.

Mr. METZGER.—Yes.

The COURT.—Objection overruled.

Mr. HENDERSON.—The question was as to whether or not they are similar forms. Now, as to the amount, I think under the Court's ruling admitting in, although we think that is not competent to show whether they are similar bonds, it opens up an issue not in this case. [89]

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

A. These bonds are similar in many respects to the bonds we then had.

Q. Now, at that time, what was the—can you tell me what was the indebtedness of the American Wood Pipe Company to the bank, approximately?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

A. I am not prepared to tell you. The indebtedness was in excess of the bonds."

On that day I had a conversation with Mr. Caesar, in the offices of the bank. I telephoned Mr. Caesar and asked him to come down. When he came in I told him why.

(Upon objection to questions as to what he told



(Testimony of R. R. Mattison.)

Mr. Caesar, sustained by the Court, plaintiff later made an offer of proof.)

On January 2, 1929, the American Wood Pipe Company was indebted to the bank in a considerable sum. On that day the Wood Pipe Company applied to the bank for an advance on the basis of the assignment of an account with which was tendered a bond of the Aetna Company. Documents marked for identification Exhibits 14 and 15 and Exhibit 7 are documents tendered to me at that time, and there would be also a duplicate of this invoice, another copy of it. At that time the bank made an advance to the American Wood Pipe Company in the sum of \$3,270.00. (To which defendant objected on ground that it was incompetent, irrelevant and immaterial. Objection overruled. Exception allowed.) The advance was made on those documents.

(Identifications 14 and 15 offered in evidence, to which [90] defendant objected on the ground of incompetency, relevancy and immateriality, and tending to prove no issue in the case, and on the further ground that plaintiff was asserting no right to recover on these instruments, but claiming the full amount of the order rather than the amount which the bank advanced. Objection overruled and exception allowed, and instruments marked Plaintiff's Exhibits 14 and 15 admitted.)

When I took that invoice on January 2, 1929, it was not understood that the goods or material called for had been manufactured.

(Testimony of R. R. Mattison.)

“Q. Have you the deposit tickets—what did you do with the advance you made at this time on this invoice?

Mr. HENDERSON.—Objected to as being incompetent, irrelevant and immaterial, what they did with it.

The COURT.—What did he say, with what?

Mr. METZGER.—The advance.

The COURT.—Objection overruled.

A. We gave the American Wood Pipe credit for it.

Q. Handing you deposit ticket of The National Bank of Tacoma, dated January 2d, is that the original record of the credit that was given?

A. Yes, sir, it is.

Mr. METZGER.—I offer the same in evidence.

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. (Whereupon, deposit ticket referred to was received in evidence and marked Plaintiff's Exhibit No. 20.)”

On January 15, 1929, the Wood Pipe Company came to me for further advance. The transaction was of the same nature as before, the Wood Pipe Company presenting the same class of document.  
[91]

Exhibit 9 and the two documents marked for identification 16 and 17 were presented at that time. I made an advance at that time, based on the assignment of the invoice covered by the bond of the Aetna Company. The advance of January 21, 1929, was similarly based.

(Testimony of R. R. Mattison.)

(Documents marked 16 and 17 were thereupon offered and admitted in evidence over the objection of the defendant that the same were incompetent, irrelevant and immaterial, the objection being overruled and exception allowed.) The amount of that advance was \$3,545. It was credited to the account of the American Wood Pipe Company. Original deposit slip of January 15, 1929, shows the deposit of that amount.

(Whereupon, two ledger sheets of the account of the American Wood Pipe Company with the bank were introduced in evidence as Plaintiff's Exhibit 21 and deposit slip referred to received in evidence and marked Plaintiff's Exhibit 22.)

These ledger sheets covered the account of the American Wood Pipe Company starting with January 1, 1929, and carrying through until February 1st of the same year.

About January 21st they applied for a further advance on the same basis as the previous advances, in accordance with the practice that had been in vogue for several months. Exhibits 18, 19 and 11 were the documents tendered at that time. We made an advance of \$3,375 based on the assignment of an invoice against the Twin Harbors Lumber Company, supported by the bond of the Aetna Casualty and Surety Company.

(These documents were offered in evidence, and over the objection of the defendant were admitted and marked Plaintiff's Exhibits 18 and 19. Deposit ticket of January 21, offered and admitted in evidence as Plaintiff's Exhibit 23.)

(Testimony of R. R. Mattison.)

The first connection the bank had with these bonds, or any of them, was when the first one was presented to us. That is the first connection we had with that particular bond. Referring to Exhibit 15, invoice of January 2d, the bank never received anything as the proceeds of that invoice. [92]

“Q. If the order there called for had been carried out according to its terms, how much would have been payable under the terms of that invoice?

Mr. HENDERSON.—Objected to as calling for the conclusion of the witness. The invoices speaks for itself.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception.

A. It would have been the expectation to receive the amount of the invoices less the deductible allowances.”

The invoice showed the terms of the sale in this case. The note which we took as evidence of the advance made at that time bears a memorandum of the company, in which it is undertaken to make the calculation which would be followed in the determination of the amount due on the invoice. From what I am able to say that it was anticipated we would receive from the payment of this invoice, \$3,633.75. The amount of our advance at that time was \$3,270. We have received nothing from the proceeds of that invoice.

Referring to the transaction of January 15th, we have not received anything from the proceeds of that invoice.



(Testimony of R. R. Mattison.)

“Q. If it had been carried out and shipment made, what could you have received?

Mr. HENDERSON.—Objected to as the question assumes something that is not in proof, and which is immaterial in the form in which it is asked. The witness has been asked if the order had been filled, and the witness has formerly testified it received nothing. Now, to assume the order is not filled without proof we think is objectionable.

The COURT.—The jury will not conclude on this evidence that the order was not filled.

Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.”

A. We expected to receive \$3,942.50. Our advance was \$3,545. [93]

With reference to the transaction of January 24th, the advance was \$3,375 and we expected to receive \$3,750. We have not received anything. The American Wood Pipe Company is not operating. I think it was April, 1929, the company went into the hands of the receiver. The receivership did not fill these orders. The receiver filled no part of these orders. The American Wood Pipe Company is indebted to the bank at present in approximately the sum of \$99,500. That indebtedness includes the amounts of the advances made against these particular bonds.

“Q. Mr. Mattison, did The National Bank of Tacoma order any of the material covered by these invoices from the American Wood Pipe Company?

(Testimony of R. R. Mattison.)

Mr. HENDERSON.—Objected to as incompetent and immaterial and attempting to vary the terms of the bond.

The COURT.—Read the question.

(Question read.)

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

A. No, we did not.”

The bank had no relation with these three bonds and these invoices, other than the making of the advances as I have related.

(Subject to a reservation as to further questions concerning an offer of proof, the plaintiff discontinued further direct examination of this witness.)

Cross-examination by Mr. HENDERSON.

On January 2d when this bond marked Plaintiff's Exhibit 7 was taken, I would not know whether the account of the American Wood Pipe Company with the bank happened to be overdrawn that day or not.

“Q. Well, don't you know without looking at the books; as a matter of fact, on this bond and the other two, that you yourself called up the American Wood Pipe Company and told them that they were overdrawn and that these arrangements were made for the purpose of covering overdraft? [94]

Mr. METZGER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I will hear from Mr. Henderson.

Mr. HENDERSON.—Well, if the Court please, our contention in this matter is that they are claiming that at the time these notes and bonds were taken they were making advances. It is our purpose to show at that time the advances had already been made in the way of overdraft, not that the advances were made at that particular time.

The COURT.—The Court is unable to see it makes any difference.

Mr. HENDERSON.—That was rather our position when we objected to the introduction of the advances, the amount of the indebtedness they had, in the theory of this case, but the witness testified the advances were made at that time and evidenced by these instruments. What I propose to show, advances had been made prior to the acceptance of these.

The COURT.—You wish to show they falsified the deposit slip?

Mr. HENDERSON.—No, I want to show the bank, at that time, had already made the advances in covering an overdraft when they did not have any money in the bank, and the bank honored those checks—

The COURT.—In lessening a debt already owed?

Mr. HENDERSON.—Yes.

The COURT.—The Court is unable to see it makes any difference. Objection sustained.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

Mr. HENDERSON.—I might say to the Court

(Testimony of R. R. Mattison.)

that our contention is that if the theory is they were damaged by this action, they are in no worse position than if they had not taken it, because they already owed the money.

The COURT.—Objection sustained.

Mr. HENDERSON.—Save an exception.”

Notation “Shipment No. 8452” on Plaintiff’s Exhibit 14 dated January 2d is a memorandum of the Wood Pipe Company. It does not mean anything [95] to us. Oh, yes, it is our note, that is to say, it is a note payable to us. No, it was not made out at the bank. The American Wood Pipe Company made that. They made out the note, and we accepted it in the condition it is in now. I knew there had been no shipment made at the time we received this. I do not see anything on there that would indicate about the dates shipped.

Defendant’s Exhibit 18 has a memorandum which reads “Date shipped, January 21, 1929.” The date of the instrument is January 21, 1929. The note came to us at the bank in that condition. That is true, there was not any shipment made. That was simply a memorandum of the Company, which did not mean anything, of course, to us. No, “Date Shipped, January 15th” on Plaintiff’s Exhibit 16 was put in by the American Wood Pipe Company, and it was in that condition when we accepted it. Yes, we knew at that time that the stuff had not been shipped. There would have been no occasion to provide a bond, of course, if we had a bill of lading instead of a bond. The memorandum states



(Testimony of R. R. Mattison.)

that it had not been shipped either on January 15th or January 21st, when the notes recite they have been shipped. In addition to these bonds we had other collateral which, under the terms of the collateral agreement, would be applicable at our direction to any debt owed to us. Yes, we still have some other collateral.

Redirect Examination by Mr. METZGER.

This additional collateral did not equal the indebtedness, we are inadequately secured. Including the Aetna bonds and other collateral, we still regard it as inadequately secured. Exhibits 16, 18 and 14 were prepared by the Wood Pipe Company and tendered to us with the other documents. The numbers appearing on the memorandum on the note form undershipment are the numbers shown on the invoices as the order numbers. I say, if shipment had been made the invoices would have been accompanied by a bill of lading. I also said that all of these transactions were complying with the practice we had been following to provide money in advance of shipment.

Recross-examination by Mr. HENDERSON. [96]

We did not notify the Twin Harbors Lumber Company that we had these invoices. There would be no occasion for our notifying them until we knew the shipment was made. We would notify them when we got the shipment. I think there was some communication with them regarding the invoices since that time.

TESTIMONY OF GUY T. PIERCE, FOR  
PLAINTIFF.

GUY T. PIERCE, produced as a witness by the plaintiff, being first duly sworn, testified on direct examination.

I am connected with the plaintiff as vice-president. In 1928 and 1929 I was assistant vice-president. I have been with the bank about 25 years. During that time I was approving loans of the American Wood Pipe Company. In the summer of 1928 the Wood Pipe Company was indebted to the bank. I have the bank records here showing the indebtedness of the Wood Pipe Company to the bank from about May, 1928, up to date; also what it was on January 2d, and daily throughout January, 1929.

(Record offered in evidence. Objected to as irrelevant, immaterial and tending to prove no issue in the case. Objection overruled.)

The assignment account consists of 11 sheets. There were two accounts kept separate.

(Whereupon, the accounts were received in evidence and marked Plaintiff's Exhibit 24.)

I only have part of the record here. This covers the assigned accounts. By assigned accounts I mean assigned invoices. That is where the bank had taken an assignment of an invoice for materials to be manufactured and shipped by the Wood Pipe Company. [97]

On June 30, 1928, the Wood Pipe Company was indebted to the bank in the sum of \$186,390.00. At

## 94    *The Aetna Casualty & Surety Company*

(Testimony of Guy T. Pierce.)

the same time, the Wood Pipe Company was indebted on the other account in the sum of \$56,000.00. The other account is the record of their straight notes, direct loans.

(Over the same objection, which was overruled and exception allowed, the Court further permitted the witness to testify):

On December 26, 1928, the amount of the assigned accounts was \$126,263.67, while the direct loans were \$20,000. On January 2, 1929, \$20,000 on the straight, direct loans, and \$131,088.67 on assigned accounts, which amount included the advance of \$3,270.00 on January 2, 1929. On January 15, 1929, assigned accounts were \$154,899.99 and direct loans \$20,000.00. The assigned accounts included the advance of \$3,545 made on that day. On January 21, 1929, the assigned accounts were \$160,984.61, which included the advance of \$3,375 made on that date. On that date the direct loans were \$20,000. To-day, the direct loans are \$17,090.45 and the assigned accounts are \$82,434.42, or a total of \$99,500.

Calling your attention to the bond, Exhibit 7, and the assigned invoice, Exhibit 15 and Exhibit 14, the bank never received any of the proceeds from that assigned invoice. The bank never received any payments from the defendant, Surety Company, on account of the bond, referring to the order. The bank has never received from any source repayment of any part of that particular advance which amounted to \$3,270, Evidenced by the note of the American Wood Pipe Company signed by its president and secretary. This advance was based on assigned in-

(Testimony of Guy T. Pierce.)

voice. When we made the advance we received that signed invoice and the bond.

(At this point the witness was excused, to be recalled for further examination.)

“The COURT.—Do you wish to make your two offers and argue them at one time, or make them separately, and make one and argue it and then make the other and argue it?”

Mr. METZGER.—I think I can make them both at the same time. [98]

Now I offer to prove by Mr. R. R. Mattison, the witness who was first called this morning, and I also offer to prove by Mr. Pierce, who is now on the stand—I haven’t asked him anything about it yet, and your Honor has not ruled upon it, but this part covers the same thing, that on the 26th day of December, 1928, Mr. Mattison and Mr. Pierce had a talk with Mr. Caesar, a resident—the attorney-in-fact and the resident vice-president of the Surety Company, with regard to the practice that had been followed, and the continuance of the practice with regard to the bonds issued and to be issued by the defendant surety company; that at that time it was stated to Mr. Caesar that the bank already had made advances and held bonds indemnifying it against loss, in the penal sum aggregating \$37,000; that the bank could not see any good to be obtained from continuing the practice of making advances secured by bond against the earnings of unfilled orders.

The bank then informed Mr. Caesar—went over the whole transaction with him; stated to him that



(Testimony of Guy T. Pierce.)

it was making these advances, as he knew and admitted that he knew, against orders yet to be fulfilled. The bank had no knowledge that there were any such orders; that he stated it was his responsibility to see that there were orders, the surety company was guarantying that there were orders, the Surety Company was, and he on behalf of the Surety Company was attending to that, making it his business to watch the progress by frequent visits to the wood pipe company, and watch the progress towards the completion of these orders covered by these bonds; that Mr. Caesar at that time stated to Mr. Mattison and Mr. Pierce that his company was willing to continue to furnish bonds of this character. The bank stated they thought it was inadvisable; that he stated that in their opinion—Mr. Caesar stated in their opinion the American Wood Pipe Company would pull out if the bonds were continued, and the bank continued to make advances, and requested the bank to continue to make advances on the strength of these bonds to be furnished; that Mr. Caesar stated at that time that he and the surety company were advised that these advances were being made, particular advances on invoices against shipments to be manufactured and shipped, or [99] orders to be manufactured and shipped, not on completed order; that he was in touch with the progress of the work in completing such orders. And we further offer to prove by both of these witnesses that they, as officers of the bank, and the bank through them, continued the practice that had been in effect until the 26th of December and accepted the par-

(Testimony of Guy T. Pierce.)

ticular bonds in suit, in reliance upon or under the circumstances disclosed by this conversation, and that—I should go back and say in part of that conversation of the original offer, we offer to prove that both Mr. Mattison and Mr. Pierce pointed out to Mr. Caesar in terms that the bank was relying upon the bonds to guaranty that there was such an order as was recited in the bond; that Mr. Caesar acknowledged that he understood that to be the fact, and then, to go on with this other offer, that they continued the practice under the same circumstances, and in reliance upon the representations in the bond, that there was the order recited therein; that the bank had no part in the procurement of the bonds from the Surety Company, but relied upon the representations in it contained for the indemnity contemplated between the parties, as indicated by this conversation.

The COURT.—Is the objection renewed?

Mr. HENDERSON.—The objection is renewed, if the Court please.

The COURT.—The objection is sustained.

The answer the Court cannot see that this has anything to do with the case except—*is* the first affirmative defense. That is part of it, the acceptance of the bond by the plaintiff containing the recitals therein. The plaintiff represented that such an order was in existence, and is now estopped to *deny* such representations. The bond provides the shipment to be made within sixty days, which order is by reference made a part

hereof, as fully, to all intents and purposes as if set forth at length. Therefore, if the said principal shall supply the material in accordance with the written order, and if they will indemnify, the Twin Harbors Lumber Company and so forth—I don't see that it makes any difference whether the credit was given on the open account, or advance made, or what not. They are—the [100] undertaking of the surety company is that the principal, the pipe company, shall supply the material in accordance with the written order, described in the bond itself. Anything to be added to that is not admissible at this time. If, in the defense the defendant tries to go, or is allowed to go beyond this statement that the acceptance of the bond by the plaintiff, containing the recitals therein, by that the plaintiff represented that the order was in existence—that is, made any representations that misled the defendant—if the court permits anything of that kind, why then in rebuttal these conversations may be admissible to show that the defendant was in no way misled, but so far as any recitals in the bond are concerned, the Court does not see that the defendant could have been misled as to the condition regarding these orders, and it recites—it gives them sixty days to fulfill the order.

Mr. METZGER.—That is true, your Honor.

The COURT.—I do not see how they can say they thought it was already filled.

The Court will be at—

Mr. METZGER.—I want for the record, your Honor, I want to say I renew these offers, not for



(Testimony of Guy T. Pierce.)

the purpose of bearing on the bond, but merely for the purpose of showing the general situation of the parties, and the situation under which the bonds were written, and furnished to the plaintiff. Your Honor will bear in mind of course that here was a whole series of transactions. Now, these conversations on the 26th day of December—and the same conversation did not occur every time a bond was tendered, but I think my thought is that that conversation shows the circumstances then existing which applied to the bonds thereafter written and furnished to the bank until and unless some change in circumstances occurred. That is part of the situation under which the bonds were written and signed by the bank.

The COURT.—Objection is renewed?

Mr. HENDERSON.—The objection is renewed.

The COURT.—Sustained.

Mr. METZGER.—Will you allow us an exception to both rulings? [101]

The COURT.—Exception allowed to both rulings.”

GUY T. PIERCE, direct examination resumed.

The bank has not received anything from the proceeds of the assigned invoice of January 2, 1929. The defendant, Surety Company, has not paid the bank anything under or on account of the bond which was furnished with that invoice. The advance made on January 15, 1929, was based upon the invoice and the bond of that corresponding date,



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(Testimony of Guy T. Pierce.)

Exhibits 17 and 9. The bank has not received from any source any proceeds upon that invoice.

The bank has not been paid anything by the Surety Company under or on account of the bond which we took at that time. That advance was based upon the assigned invoice and the bond. The advance of January 21, 1929, in the sum of \$3,375 was based upon Exhibits 11 and 19. They were submitted to me before the advance was made. We have not received anything from the proceeds of that invoice, nor anything from the Bonding Company under or on account of the bond. The outstanding indebtedness to date of the Wood Pipe Company is something over \$99,000.00, which includes the indebtedness created through the advances made on these three dates.

“Q. Mr. Pierce, were either of the advances made on these dates, January 2, 15th and 21st, made in reliance upon anything other than the documents which accompanied—which were presented at the time the particular advances were made?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial, and improper examination of the witness.

The COURT.—Objection overruled.

A. No, sir.

Mr. HENDERSON.—If the Court please, we now move to strike from the record the introduction of the exhibit which is a collateral trust agreement, on the ground that it is incompetent, irrelevant and immaterial, and in view of the fact that the plaintiff

(Testimony of Guy T. Pierce.)

has testified that it placed no reliance [102] upon that collateral agreement at the time it made any of the advances.

The COURT.—Motion denied.

Mr. HENDERSON.—Exception.

The COURT.—Allowed.”

I was present at the bank at a meeting with Mr. Mattison and Mr. Caesar in December, 1928. I think it was December 26th. I sat in on the conversation. That conversation related to the method of handling the business of the American Wood Pipe Company. (Witness excused.)

## TESTIMONY OF M. H. WILLIAMS, FOR PLAINTIFF.

M. H. WILLIAMS, produced as a witness by the plaintiff, being first duly sworn, testified on direct examination.

I live in Seattle. I was living in Chehalis in the latter part of 1928 and January, 1929. I am the office manager of the car and railroad material department of the Twin Harbors Lumber Company, having occupied that position three and one-half years. I had the same position while at Chehalis during the period referred to. The Twin Harbors Lumber Company had business with the American Wood Pipe Company at that time. That business was handled through my office. I might qualify that by saying so far as the placing and checking orders was concerned. The financing was done at our Aberdeen office. Our company is still in business.

(Testimony of M. H. Williams.)

That department has moved its offices to Seattle. In December, 1928, and January, 1929, and all through the year 1929, it was a solvent concern, able to pay for any orders that it placed.

“Q. Now, I will call your attention to Exhibit 15, which purports—never has been read to the jury, but which reads it was an invoice dated January 2, 1929. It says: ‘Sold to Twin Harbors Lumber Company, Aberdeen, Washington, shipped to the American Car & Foundry Company, Chicago, Ill., their order number 8452, Requisition No. December 31, 1928, B & better longitudinal sheathing, dressed clean two sides T & G to 1½x5½” face in accordance with figures shown on blue print 1724015, 2x6, 4250 pieces, 18 feet long, 76,500 feet at \$50.00 a thousand, \$3825.00’ I will ask you if your company had [103] placed any such order with the American Wood Pipe Company?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial, and an attempt—for the further reason that it is an attempt to vary the specified written recital of the bond, which recites that there was a written order, which bond—and that the written order is by reference made a part of the bond, as if fully set out therein, and this is an attempt to show that, first, the bond was not complete when it was delivered, and second they varied the terms of the written instrument itself.

The COURT.—Objection overruled.

Mr. HENDERSON.—Exception.

The COURT.—Exception allowed.

A. No, we did not.

(Testimony of M. H. Williams.)

Q. Was any material corresponding to that order ever furnished to you by the American Wood Pipe Company, or by its receiver?

Mr. HENDERSON.—Objected to as being irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. HENDERSON.—Exception.

A. At various times we were ordering material of that sort.”

We ordered no such material under that order. No such material was *every* furnished by or on behalf of the Wood Pipe Company.

“Q. Now, I want to call your attention next, Mr. Williams, to an invoice which is Plaintiff’s Exhibit 17, and dated January 15th, of the American Wood Pipe Company, and reads: ‘Sold to the Twin Harbors Lumber Company, Aberdeen, Washington, shipped to Chicago, Ill., Requisition No. January 14th, 1929, our order No. 8466.’ Calls for ‘B & better fir, kiln dried 1½x4’’, S2S to 1¼x3¾’’, edges rough, length nine, a hundred thousand board feet, at \$41.50 per thousand, total \$4,150.00.’

I will ask you if the Twin Harbors Lumber Company placed with the American Wood Pipe Company any order or requisition such as called for by that invoice?

Mr. HENDERSON.—That is objected to as being incompetent, [104] irrelevant and immaterial, for the reason that the invoice is not a written order, nor does it purport to be a written order, and for the further reason that the bond in this case re-



(Testimony of M. H. Williams.)

cites that there was a written order. The further reason that the pleadings recite that there was such order, and it is an attempt to vary the recitals and terms of the written instrument.

The COURT.—Objection overruled.

Mr. HENDERSON.—Take an exception.

The COURT.—Allowed.

A. Not at this date, there was no order of this kind.” Not in or about this date.

“Q. Did the American Wood Pipe Company or anybody on its behalf, ship to you subsequent to the date there shown as the date of the requisition, which I think is January 14th, 1929?

A. Yes, sir.

Q. (Continuing.) Any material corresponding to that shown in that invoice?

Mr. HENDERSON.—Objected to as irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

A. Well, I—without consulting my memorandum, I would not be able to state definitely as to that, because we were ordering this sort of lumber at different times, but there was nothing of this order against this order number.”

There was no order like that. No shipments of an order corresponding to that.

“Q. Now, I want to call your attention then to Exhibit 19, which purports to be an invoice—is an invoice dated Jan. 21st, 1929. Again ‘Sold to the Twin Harbors Lumber Company, Aberdeen,

(Testimony of M. H. Williams.)

Washington, shipped to the above at Chicago, Ill., Requisition Number dated January 19, 1928, their order 8472.' It called for 'No. 2 clear & better kiln dried fir S2S 11¼x3¾"—edges [105] rough 1½x4", nine foot lengths, 50,000 feet at \$41.40, eight foot lengths, 50,000 feet at 37.50, total of \$3,950.00.'

Now, I will ask you with respect to that invoice, whether or not you had placed any such order as that with the American Wood Pipe Company at or about the 19th of January, 1929?

Mr. HENDERSON.—Object as has been heretofore stated, concerning like invoices and like questions.

The COURT.—Objection overruled.

Mr. HENDERSON.—Exception.

A. We did not."

Neither the American Wood Pipe Company nor anybody on its behalf, shipped to us at Chicago, nor anywhere else, any material under an order corresponding to that. We were never furnished with a bond by the American Wood Pipe Company in connection with those purported orders.

(The foregoing testimony was objected to as irrelevant, immaterial and an attempt to vary the terms of the bond. Overruled. Exception taken and allowed. Over objection which was overruled and exception saved, the Court permitted the witness to further testify that they never knew that a bond had been issued by the defendant as surety, one of the conditions of which was to guaranty the fulfillment of those orders.)

(Testimony of M. H. Williams.)

I never saw any bonds purporting to be given in connection with those orders.

“Q. Well, were any such bonds given to your company, the Twin Harbors Lumber Company?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial, and an attempt to vary the terms of the bonds. It runs directly to the Twin Harbors Lumber Company.

Mr. METZGER.—I am asking about delivery.

The COURT.—Objection sustained.

Mr. METZGER.—Your Honor, I think we have a right to show whether a bond was delivered to this company—whether they have any knowledge of a [106] bond.

The COURT.—Well, the objection is overruled.

Q. Will you answer the question, then?

A. So far as the Chehalis office is concerned, I know nothing of any bonds, whatever.

Q. Did the Twin Harbors Lumber Company ever have any claim against any bond that might have been written in connection with these orders?

Mr. HENDERSON.—Object as being irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. HENDERSON.—Exception.

A. No, sir.

Q. Now, to make it specific, here are three bonds, which are in evidence as exhibits 7, 99 and 11, and dated respectively January 2, 15th and 21st. I will ask you to examine those bonds, in connection with the invoices which you have in your hand, the other exhibits, and then I would inquire whether or not

(Testimony of M. H. Williams.)

those bonds or copies of those bonds were ever delivered to your company?

Mr. HENDERSON.—Objected to as irrelevant and immaterial.

The COURT.—Objection overruled.

A. Not to the Chehalis office.

Mr. HENDERSON.—Exception.

Q. Not to the Chehalis office? A. No. 2.

## TESTIMONY OF TULLY STALLARD, FOR PLAINTIFF.

TULLY STALLARD, produced as a witness by the plaintiff, being duly sworn, testified on direct examination.

My home is Aberdeen, Washington. I have been connected with Twin Harbors Lumber Company as auditor for the last 5 years. In 1928 and the early part of 1929 the business of that company was purchasing and selling lumber. It was doing business with American Wood Pipe Company of Tacoma. [107]

“Q. In connection with the business done by the American Wood Pipe Company with the Twin Harbors Lumber Company, were there ever any bonds delivered to the Twin Harbors Lumber Company purporting to guaranty the compliance or fulfillment of orders placed by the Twin Harbors Lumber Company?

Mr. HENDERSON.—Objected to as incompetent, irrelevant and immaterial.



(Testimony of Tully Stallard.)

The COURT.—Objection overruled.

A. No, sir.

Q. Now, one other general question, Mr. Stallard, The Twin Harbors Lumber Company—what was its financial condition in 1929, January, the first six months of January, 1929? A. Sound.

Mr. HENDERSON.—Objected to as irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. HENDERSON.—Exception.

The COURT.—What was the answer?

A. Sound.

Q. It was solvent, was it? A. Yes, sir.

Q. Calling your attention to Exhibit 15, which purports to be an invoice from the Twin Harbors Lumber Company on account of a shipment to you, or sale to you, rather, of certain equipment or certain lumber, total price being shown on this invoice, \$3,825.00 I will ask you whether or not the Twin Harbor Lumber Company had placed any order on or about December 31st—or 1928 or January, 1929, according to that invoice?

Mr. HENDERSON.—Objected to for the same ground as stated upon the same question asked Mr. Williams.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

Over objections on the same grounds as stated in the [108] objections to the same questions asked the preceding witness, Mr. Williams, which objections were overruled and exception allowed, the

(Testimony of Tully Stallard.)

Court permitted the plaintiff to testify that the Twin Harbors Lumber Company had not placed any order with the American Wood Pipe Company as indicated in invoice, Exhibit 15; that no material was furnished to the Lumber Company by the Wood Pipe Company pursuant to such purported order.

“Q. Mr. Stallard, I wish you would look at that invoice and the terms of it as stated therein and I would ask you is that had been—if that order or shipment had been carried out, the material called for shipped, how much would have been payable under the terms of that invoice?

Mr. HENDERSON.—Objected to as irrelevant and immaterial.

The COURT.—Are you examining him as an expert on such invoices?

Mr. METZGER.—He is the auditor of the company, in the business of buying and selling this kind of stuff—just simply to get the amount before the jury, that is all.

The COURT.—You are asking his to interpret?

Mr. METZGER.—To interpret that invoice.

The COURT.—Objection overruled.

A. In paying this invoice, we would take a five per cent commission, and two per cent on the balance, and remit the balance.”

The two per cent is for discount for cash in accordance with the terms of the invoice. Two per cent in ten days after shipment.

“Q. Now, calling your attention to Exhibit 17,

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(Testimony of Tully Stallard.)

which purports to be [109] an invoice, on order to you for a hundred thousand feet of surfaced two by fours, I guess, if you will examine it, the total invoice—gross invoice price there is \$4,150.00. I will ask you whether or not the order about January 14, 1929, or January 15th, 1929, you placed an order with the American Wood Pipe Company for that, according to that invoice?

Mr. HENDERSON.—Objection as has been heretofore made.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save an exception.

The COURT.—Allowed.

A. No, sir.”

The Wood Pipe Company did not, after that date, ship to us, on our order, any part of the material called for by said exhibit. There is no difference in the terms of that invoice as to the amount that would be payable had shipment been made under that order than in the other. We would take off five per cent commission and on the balance two per cent for cash. That is, off the invoice price.

“Q. Now, then, I call your attention then to—pardon me, to exhibit number 19, which purports to be an invoice for goods to be shipped to you, and requisition dated January 19, 1921, the invoice being dated January 21, 1929, I should say. I think maybe I said '21. A. This shows '28.

Q. Beg pardon? A. 1928.

Q. Does that show '28, which, the requisition number? A. Requisition shows '28.

(Testimony of Tully Stallard.)

Q. Requisition shows '28. I will ask you if the Twin Harbors Lumber Company placed any such order with the American Wood Pipe Company corresponding with that invoice?

MR. HENDERSON.—Objected to as incompetent, irrelevant and immaterial; an attempt to vary the terms of the bond and is not the date referred to in the complaint. [110]

THE COURT.—I will ask you to refer to the complaint and see whether it is not the date.

MR. HENDERSON.—'28, I understand.

THE COURT.—There was one of them said '28, as I recall.

MR. METZGER.—I think the copy shows—

THE COURT.—It is just a question whether it was a mistake in the year, made soon after the beginning of the year.

MR. HENDERSON.—I think the bonds are all dated in 1929, that are introduced. The invoices—maybe because it is dated differently from the bond and from the allegation.

THE COURT.—Which suit is that in?

MR. METZGER.—8176, if your Honor please.

MR. HENDERSON.—I think the bond states dated December 21, 1928, if that is the one. May I ask if that is of December 21st, 1928?

A. No, sir.

MR. METZGER.—The copy attached shows 1/19/28, when the date of the invoice and the bond is 1/21/29.

MR. HENDERSON.—The bond is what I am referring to. Is that what the bond itself recites?



(Testimony of Tully Stallard.)

One is dated December 21st, 1928, the bond they are suing on, and the other one states January 19, 1929, and the other date is January 14, 1929, and those are the ones referred to in the bond, and identified by dates as a part of the bond. Now, we are objecting to the question because the instrument before him is evidently none of the instruments referred to in these bonds introduced.

The COURT.—Objection overruled.

Mr. HENDERSON.—Save us an exception.

The COURT.—Allowed.

Q. Do you remember what the question was, Mr. Stallard? The invoice you have there says it is on requisition and the figures used is 1/19/28?

A. Yes. [111]

Q. The invoice itself is dated 1/21/29?

A. Yes, sir.

Q. And I ask you if you placed with the American Wood Pipe Company on or about the 19th of January, 1929, any order such as covered by that invoice, —corresponding to that invoice? A. No, sir.”

Subsequent to that date the Wood Pipe Company did not make shipment to us of any part or all of the material called for by that order. There were never any shipments made to the Lumber Company pursuant to or on account of any of those so-called orders.

Referring to invoice dated January 21, 1929, the amount of \$3,950.00 less five per cent commission and two per cent discount for cash would have been payable had the order been completed according to its terms. The terms of all three with regard to dis-

(Testimony of Joe Long.)

counts are exactly the same. The Twin Harbors Lumber Company would have paid on that basis had it placed such orders, and they had been filled. It was solvent and able to pay at that time, and is yet.

### TESTIMONY OF JOE LONG, FOR PLAINTIFF.

JOE LONG, produced as a witness by the plaintiff, being first duly sworn, testified on direct examination:

I have lived in Tacoma for the last 30 years. I was and still am receiver of the American Wood Pipe Company, appointed April 18, 1929. I am still acting as such receiver. As receiver, I did not fill any orders that had been placed with that company by the Twin Harbors Lumber Company. When I took over the Company as receiver I did not find in the records of the Company any orders from the Twin Harbors Lumber Company for material as called for in these invoices, Exhibits 15, 17 and 19.

(To which testimony the defendant objected as being irrelevant and immaterial, which objection was overruled and exception allowed to the defendant.)  
[112]

“Mr. METZGER.—The plaintiff rests, if your Honor please.

Mr. HENDERSON.—At this time the defendant Aetna Casualty & Surety Company, for the reason that there is no evidence of any damage suffered by the plaintiff, under either or any of the bonds sued upon, for which damage the defendant would be

liable under any or either of the bonds sued upon, and in the *laternative*, the defendant moves that the complaint of plaintiff be dismissed for the reason that there is no evidence of any damage suffered by the plaintiff for which the defendant would be liable under any or either of the bonds.

The COURT.—Motion is made in each case?

Mr. HENDERSON.—Motions to apply in each case.

The COURT.—Motion denied in each case.

Mr. HENDERSON.—Save us an exception.

The COURT.—Exceptions allowed. Any opening statement?

Mr. HENDERSON.—The defendant Aetna Casualty & Surety Company in each case moves the Court to direct the jury to return a verdict for the defendant in each case, for the reason that there is a complete failure of proof, and in the alternative, the defendant moves to dismiss the complaint for the same reason.

The COURT.—Motions denied in each case.

Mr. HENDERSON.—The defendant rests.

Mr. METZGER.—The plaintiff then moves the Court to direct a verdict in each case for the amount in each invoice less five and two per cent, with interest.

The COURT.—From what day?

Mr. METZGER.—From the date of the receivership, April, 1929.

The COURT.—Prepare your verdict.

Mr. HENDERSON.—The defendant excepts to such direction for the reason that, First: there is no

proof that the plaintiff bank, which is named as one of the vendees in the bond, did not place an order as recited in the bond. For the further reason that there is no evidence of any damage suffered by the plaintiff, for which the defendant is liable, and for the reason that there is a failure of proof of the allegations of the complaint of plaintiff sufficient to justify a recovery. The exceptions to apply in each case.

The COURT.—Exceptions allowed.” \* \* \*  
[113]

“The COURT.—Let the record show the jurors are all present.

These amounts written in exceed, in each case exceed the face of the amount of the bond, do they not?

Mr. METZGER.—Because of the interest, yes, your Honor.

The COURT.—Well, your contention, is that for the amount due from the company or from the defendant on its bond? The principal was within the face of the bond. That interest accrues on that obligation just the same as any other obligation?

Mr. METZGER.—Yes, your Honor.

The COURT.—This interest is calculated at six per cent?

Mr. METZGER.—At six per cent.

The COURT.—What was the date of the receivership?

Mr. METZGER.—Didn't Mr. Long testify he was appointed April 18th, 1929?



The COURT.—That in each case, that would exceed 70 days from the date of the invoice?

Mr. METZGER.—Yes, your Honor, 70 days from January 21st would be at most April 1st, or April 2d, 70 days from January 21st.

The COURT.—Gentlemen, you and the court have listened to the evidence in this case, and it is part of the duty of the court to construe written contracts, and the court in this case finds nothing in the case to take it out of the construction of these written contracts, and finds no issue of fact to submit to a jury, and the court has directed verdicts to be prepared in favor of the plaintiff, reading as follows: ‘We the jury in the above-entitled action, do find in favor of the plaintiff, The National Bank of Tacoma, a corporation, and against the defendant, The Aetna Casualty & Surety Company, in the sum of \$4,244.36, being instructed by the Court so to do. Dated this 13th day of November, 1931.’

The COURT.—The bailiff will hand the pen to Mr. Angrove, the Foreman, and he will sign the verdict.” [114]

Mr. HENDERSON.—We believe, probably for the record, it is necessary to take our exceptions after the instructions are given. For that reason, the defendant excepts to the instructions of the Court for the reason that, First, there is no proof of any damage sustained by the plaintiff in any or either of the cases for which the defendant is liable. Second, that in any event the bond being joint or several, the recovery could not exceed one-half of the bond, in view of the fact that the other

obligees, the Twin Harbors Lumber Company is not a party to this action. Third, in any event the recovery right could not exceed the amount which it is alleged was advanced at the time the bond was given. Fourth, for the further reason that interest is not recoverable except from the date that demand was made upon the Surety Company, as held by the Supreme Court of this state.

The COURT.—The plaintiff did not show the date of demand, as I recall. Plaintiff ask to show when demand was made?

Mr. METZGER.—No, your Honor. I think we are entitled to interest as calculated.

The COURT.—Exceptions allowed.

(Whereupon verdicts signed by foreman of jury and read by the Court.)

The COURT.—The verdicts will be received and filed as the verdicts of the jury in these three cases. [115]

Plaintiff's Exhibits Nos. 1 to 6, inclusive, omitted from the printed record by stipulation, it being stipulated and agreed that the defendant and its agents who signed and executed the bond here sued on were duly authorized to execute and deliver said bond.

Exhibits Nos. 7 to 10, inclusive, omitted from the printed record by stipulation, it being stipulated and agreed that they relate exclusively to matters in no way involved in this appeal.

Exhibit No. 11 omitted from the printed record by stipulation, it being stipulated and agreed that it is

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the original bond here sued on and that Exhibit "C" attached to the original complaint and printed as a part of said complaint is a true copy of said bond.

PLAINTIFF'S EXHIBIT No. 12.

SB-306012

Agency Direct

THE AETNA CASUALTY AND SURETY COMPANY.

Hartford, Connecticut.

APPLICATION FOR SUPPLY CONTRACT BOND.

NOTE!

Copy of Contract must accompany this application and all questions must be answered fully.

The Company reserves the right to decline this application and to withhold reason for declination as all information relative thereto is regarded as confidential.

1. Full name of applicant—American Wood Pipe  
(If corporation, give exact title.)  
Company. Age .....
2. Business address—3109 South Cedar St.,  
(Street, City and State.)  
Tacoma, Washington.
3. If Proposal Bond, the total contract price is  
\$. . . . ., and the final Bond will be in the  
amount of \$. . . . .
4. Amount contract—\$4,000.00 Date—January  
21st, 1929. Amount bond—\$4,000.00

5. (To whom is bond given—Twin Harbors Lum-  
(Give full name. If a corporation, give exact corporate title.)  
(ber Company and/or The National Bank  
(Business address—of Tacoma.
6. Nature of contract—Furnishing 50 M. B. M.  
S2S Edges Rough 9 ft.  
Furnishing 50 M. B. M. S2S Edges Rough  
8 ft.  
(Give concise description and location.)  
.....
7. In what business are you now engaged? Wood  
Pipe.  
How long have you been engaged in this busi-  
ness? .....  
Are you interested in any other business?..  
If so, state nature of same, location and  
under what name conducted .....  
.....
8. Have you the commodity or commodities called  
for in this contract in stock? .....  
If not, state from what source obtainable ...  
.....
9. Is it possible to obtain the commodity or com-  
modities called for in this contract in the  
open market? .....  
.....
10. Date contract commences? ..... Date to  
be completed? 60 days.
11. Penalty for non-completion on above date?  
.....
12. In what form, and when are payments to be  
made? .....



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13.    Are you required under this contract to guarantee any commodity or commodities?.....  
       If so, for what period? .....  
       Give full particulars as to guaranties .....  
       .....
14.    Will any percentage of contract price be retained to cover guarantees? .....
15.    Does this contract call for any patented articles?.....    If so, have you made arrangements to obtain the same through the party or parties holding the patent rights?..  
       .....
- Are you liable for loss occasioned by patent litigation? .....
16.    Are you having any difficulty with any present or recent contract? .....
- .....
17.    Give the following particulars in regard to uncompleted supply contracts.

LOCATION	AMOUNT	NATURE	PERCENTAGE COMPLETED.	SURETIES.
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

18.    Enumerate some of the contracts, similar to this one in nature and amount, which you have completed .....  
       .....  
       .....
19.    Statement of Assets and Liabilities Taken  
t       from the Books as of....., 19..

# ASSETS.

Cash on hand (not in bank) .....\$.....

Cash in following banks:

(give names.) .....\$.....

.....\$.....

.....\$.....

.....\$.....

---

\$.....

Stocks and Bonds: (Mar-

(Give itemized list.)

ket value.) .....\$.....

.....\$.....

.....\$.....

.....\$.....

Real Estate, title to which

is in the name of .....

(Give location, street number, city and state, and advise whether im-  
proved or unimproved.)

.....\$.....

.....\$.....

.....\$.....

Plant at cost .....\$.....

(Describe plant fully.)

Allowance for depreciation .....\$.....

---

.....\$.....

.....\$.....

Stock on hand .....

(Describe nature fully and state whether it can be used in this con-  
tract.)

.....\$.....

Due for work completed on

unfinished contracts .....\$.....

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Accounts receivable, not in-  
cluded in above .....

(Do not include anticipated profits.)

.....  
(Advise from whom larger items are due and when payable.)

Other assets .....\$.....

---

Total Assets. \$.....

### LIABILITIES.

Money borrowed from  
banks: (Give dates due.) .....\$.....

Money borrowed from  
other sources .....\$.....

Borrowed or due on Stocks  
and Bonds .....\$.....

Mortgages on Real Estate .....  
.....  
.....\$.....

Encumbrance on plant .....\$.....

Accounts payable .....\$.....

(State when larger items are due and amounts.)

Notes payable .....\$.....

Other liabilities .....\$.....

Total Liabilities, \$.....

The undersigned agrees, that the Banks may  
confirm any statement made, as to moneys  
on deposit, if the Company makes inquiry.

Witness: .....

(Contractors Signature.)

20. Has application for this Bond been made to  
another company? .....

If so, to what company, and with what result?

21. Has your application for a Bond ever been declined?..... If so, by whom? .....

22. Have you ever failed in business? .....

23. Insurance carried. ....

(State kind, amount, name of Companies and to whom payable.)

24. If a co-partnership, answer these questions:

Name of individuals composing same.

NAME

ADDRESS.

AGE.

Has any member of the firm ever failed in business? .....

25. If a corporation answer these questions:

In what state incorporated? ..... When incorporated? .....

Principal office? .....

Authorized capital? \$...... Subscribed capital? \$.....

Capital paid in cash? \$.....

26. References: Give supply houses, banks and persons to whom you have furnished supplies



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The undersigned hereby affirms, that the foregoing declarations made and answers given, are the truth without reservation, and are made for the purpose of inducing The Aetna Casualty and Surety Company of Hartford, Conn., to become or to procure surety and co-surety, if necessary, on a certain bond hereby applied for, and hereby appoints said The Aetna Casualty and Surety Company, agent for the procurement of such surety and co-surety.

The undersigned, hereinafter called the indemnitor(s), in consideration of said The Aetna Casualty and Surety Company, or any Company or Companies which it may procure in substitution or as co-surety jointly with it (all hereinafter called the Company), executing or consenting to execute the bond herein applied for, hereby covenants and agrees with the Company, its successors and assigns, as follows:

(If application is for proposal bond, fill in contract premium, and maintenance premium if any. If for contract bond, fill in maintenance premium, if any).

First: The undersigned will pay the Company the premiums herein agreed upon, to wit:

Proposal or Bid.

If the bond be a "Proposal" or "Bid" bond,  
..... Dollars, (\$.....) in advance.  
If, however, such "Proposal" or "Bid" bond shall, by its terms, guarantee the faithful performance of the contract, or if no bond guaranteeing such faithful performance will be required to supersede the said bond, then the regular charge for a contract

bond, as provided in the next two succeeding paragraphs, shall be paid by the undersigned. If the proposal bond is superseded by a final bond of this Company, guaranteeing the faithful performance of the contract, the premium charge for the proposal bond will be credited on the premium for the contract bond.

#### Contract Bond.

If the bond be a "Contract Bond" or similar instrument, the terms of which guarantee the faithful performance of the contract,—Ten and no/100 Dollars, (\$10.00) per annum in advance. Should the contract exceed the amount stipulated in this application, the undersigned agrees to pay the Company annually, as additional premium, a further sum calculated at the rate of \$2.50 per \$1,000 of such excess contract amount.

#### Maintenance or Guarantee.

If any maintenance or guarantee of the commodities called for in the contract is provided in the contract, for which either the contract bond or any separate bond which may be executed is liable, ..... Dollars, (\$.....) per annum, full term of maintenance or guarantee, however, to be paid in advance. The contract premium, if there be no maintenance or guarantee, will be paid annually, as above, until the Company shall be discharged or released from any and all liability and responsibility upon said bond, and all matters arising therefrom, and competent written legal evidence of such discharge or release, satisfactory to the Company, is served thereon at its Home Office

in the City of Hartford, Conn. Where the contract bond covers any maintenance or guarantee of the work, the contract premium will be paid annually only until the undersigned furnishes the Company with like evidence of the completion of the contract, which will be the commencement date of maintenance and maintenance premium.

Second: The undersigned will at all times indemnify and keep indemnified the Company, and hold and save it harmless from and against any and all damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, whether incurred under retainer or salary or otherwise, which it shall or may, at any time, sustain or incur by reason or in consequence of its suretyship or procurement of suretyship, and will pay over to the Company, its successors and assigns, all sums and amounts of money which it or its representative shall pay or cause to be paid, or become liable to pay, on account of such suretyship, and on account of any damage, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, whether incurred under retainer or salary or otherwise, which it may pay, or become liable to pay, by reason of the same, or in connection with any litigation, investigation, collection of premium, or other matter connected therewith, such payment to be made to the Company as soon as it shall have become liable therefor, whether it shall have paid out said sum or any part thereof, or not, and said Company is hereby authorized to prove such expenses, costs, or attorney's fees, in any action



or proceeding and to include the same in any judgment.

Third: That in the event of any *de* in the completion of the contract, or any *fail* comply with the terms and conditions thereof, whereby the Company may become liable *y* loss thereon, all payments and moneys due *to* become due under the said contract may be withheld by the obligee, to be used only for the completion of said contract; and any balance remaining in the hands of the obligee, shall, as soon as the contract is completed and accepted, be paid to the Company—and this covenant shall operate as an assignment thereof—and the residue, if any, after such reimbursement, shall be paid to the undersigned, after all liability of the Company has ceased to exist under the bond.

Fourth: That upon the making of any demand, or the giving of any notice, or the institution of any action or proceeding upon any claim, or preliminary to determining or fixing any liability which the surety may be called upon to discharge, by reason of such suretyship, the indemnitor(s) will immediately notify the surety thereof, in writing, at its said Home Office in the City of Hartford, Conn.

Fifth: That in the event of the failure of the undersigned to comply with, or make due performance of any covenant hereof, the Company may, at any time thereafter, take such steps, as it deems necessary or proper, to obtain its release from all liability under said bond, and to secure and further indemnify itself against loss, and all damage and expense which the Company may sustain or incur, or be put



to, in obtaining such release, or in further securing itself against loss, shall be borne and paid by the undersigned.

Sixth: That it shall not be necessary for the Company to give the undersigned notice of any act, fact or information, coming to the notice or knowledge of the Company, concerning or affecting its rights or liability under said suretyship, or the rights or liability of the undersigned hereunder, notice of all such being hereby expressly waived.

Seventh: Any security taken by the Company, in connection with said bond, may be held by the Company, as a protection against any bonds executed by the Company on behalf of the indemnitor(s), and outstanding at the time of the receipt of evidence showing the termination of liability on the said bond, and the Company may sell or realize upon the said collateral, at its discretion, at public or private sale, and with or without notice to the indemnitor(s) of the time or place of such sale, for the purpose of protecting itself against any claim, demand or loss under the said bond, or any other bond so outstanding.

Eighth: That for the better protection of the Company, and in further consideration of the execution of the bond herein referred to, the undersigned, as of the date hereof, hereby sells, assigns, transfers and conveys to the Company, all the right, title and interest of the undersigned, in and to all the tools, plant, equipment and materials of every nature and description, that the undersigned may now or hereafter have upon the work, or in or about the site

thereof, or at any other point and of service in connection with said contract, including as well, materials purchased for or chargeable to said contract, which may be in process of construction, in storage elsewhere, or in transportation to said site, and authorizes and empowers the Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment and materials, and enforce and enjoy such possession at any time, for its own special use and benefit, upon the following conditions viz:

This sale, transfer and assignment, shall be and remain in full force and effect as of the date hereof, and shall be and continue in full force and effect until the final completion of the contract, and of any other contract covered by a bond of the Company given for the undersigned, or at the request of the undersigned, and until the final settlement of all matters growing out of any such contract; and the Company shall, in the event of any loss or default, have full right to sell and convey the whole or any part of the property hereby sold and assigned, to make good any loss or expense incurred or to be incurred by it, by reason of the execution of the bond herein referred to, or any other bond given for or at the request of the undersigned, and the undersigned furthermore assigns all right, title and interest, that the indemnitor(s) has in and to all sub-contracts, which have been or may hereafter be entered into, and the materials embraced therein, to the extent that the Company shall accept such sub-contracts. And the Company shall, at its option, be subrogated

## 130 *The Aetna Casualty & Surety Company*

to all the rights, properties and interest of the undersigned in the contract covered by this bond.

Ninth: The indemnitor(s) agrees to accept vouchers, or other evidence of any loss paid by The Aetna Casualty and Surety Company under the bond herein applied for, together with vouchers or other evidence of payment of all costs and expenses whatever, incurred by said The Aetna Casualty and Surety Company in adjusting such loss, or in completing said contract, as *prima facie* evidence against the indemnitor(s) of the fact and extent of the indemnitor's liability, under said application, to the Aetna Casualty and Surety Company.

The indemnitor(s) further agrees, upon the commencement of any suit against the Company growing out of any matter, cause or thing whatsoever, directly or indirectly connected with, or relating to, the bond herein applied for, to deposit with the Company, cash or collateral security satisfactory to the Company, in an amount sufficient to indemnify it up to the full amount of the recovery demanded in the complaint.

That in the event of the indemnitor(s) requesting the Surety to prosecute or defend, or take part in any suit, action, proceeding, appeal, or writ of error, the indemnitor(s) will, on making such request, place the Surety in possession of funds or collateral security, approved by it, sufficient to defray any costs, charges and expenses, which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result, in consequence of its so doing, or of its said suretyship.

Tenth: That these covenants shall be binding, not only upon the undersigned, jointly and severally, but as well upon the respective heirs, executors, administrators, successors and assigns of the undersigned.

AMERICAN WOOD PIPE CO.

By VAUGHAN MORRILL, Pres.

(Officer's name and title if applicant be a corporation)

By CYRUS HAPPY, Jr., Secty.

Dated at Tacoma, Washington this 21st day of January, 1929.

NOTE.

If co-partnership, firm name must be signed with name of member acting on its behalf, and each member must sign individually as well.

If corporation, corporate name must be signed in full, with the officer's name and title on line below. Corporate seal must be impressed.

.....  
Witness:

Execution of this agreement must always be acknowledged before a notary public or other officer authorized to take acknowledgments.

State of .....,

County of .....,—ss.:

On this .... day of ....., 19..., before me personally appeared ..... to me personally known and known to me to be the individual .... described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Individual  
Acknowledgment



**Firm Acknowledgment.**  
 State of .....  
 County of .....—ss.:  
 On this .... day of ..... 19..., before me personally appeared ..... to me known and known to me to be one of the firm of ..... described in and who executed the foregoing instrument and he thereupon duly acknowledged to me that he executed the same as and for the act and deed of said firm.

**Corporation Acknowledgment.**  
 State of Washington,  
 County of Pierce,—ss.:  
 On this 21st day of January 1929, before me personally came Vaughan Morrill to me known, who being by me duly sworn, did depose and say: that he resides in Tacoma, Washington, that he is the .... President of the American Wood Pipe Company the corporation described on and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

(Seal)

O. W. BEAUCHAMP,

Notary Public. [140]

Plaintiff's Exhibit No. 13 omitted from the printed record by stipulation, it being stipulated and agreed that said exhibit is a copy of the general loan and collateral agreement, a copy of which is attached as Exhibit "A" to the plaintiff's original complaint and printed as part of said original complaint.

Plaintiff's Exhibits Nos. 14 to 17, inclusive, omitted from the printed record by stipulation, it being stipulated and agreed that they relate exclusively to matters in no way involved in this appeal.

Plaintiff's Exhibit No. 18 omitted from the printed transcript by stipulation, it being stipulated and agreed that said exhibit is the original memorandum or assignment note, of which Exhibit "D" attached to plaintiff's original complaint and printed as part of said complaint is a true copy.

Plaintiff's Exhibit No. 19 omitted from the printed transcript of the record by stipulation, it being stipulated and agreed that said exhibit is the original invoice and assignment, of which Exhibit "B" attached to the plaintiff's original complaint and printed as a part of said original complaint is a true copy.

Plaintiff's Exhibit No. 20 omitted from the printed transcript by stipulation, it being stipulated and agreed that said exhibit relates exclusively to matters in no way involved in this appeal. [149a]



SHEET NO. 1

Name - AMERICAN WOOD PIPE CO.  
Address - 50 32ND & CEDAR,  
WACOMA WASH.

Date	Checks in Detail		Deposits		Date	Balance	Proof
	Date	Balance Forward	Date	Brought Forward			
JAN 2	95.48	5.68			Jan 1 1929	741.58	741.58
JAN 2	20.86	52.50					
JAN 2	5.00	85.00			JAN 2	52.82	52.82
JAN 2	4.05	300.00			JAN 2	2.82	2.82
JAN 2	50.00						
JAN 2	110.00	17.80			JAN 2	937.28	937.28
JAN 2	500.00						
JAN 2	597.07	62.49	JAN 2	105.99	JAN 2	1,564.15	1,564.15
JAN 2	200.00		JAN 2	3,270.00			
JAN 3	165.00	33.15			JAN 3	1,262.96	1,262.96
JAN 3	45.00	6.39			JAN 3	1,157.96	1,157.96
JAN 3	100.00	5.00			JAN 3	1,046.91	1,046.91
JAN 3	111.05				JAN 3	1,127.34	1,127.34
			JAN 3	80.43	JAN 3	3,362.34	3,362.34
			JAN 3	2,235.00			
JAN 3	409.57	568.56			JAN 3	819.32	819.32
JAN 3	400.00	559.53					
JAN 3	100.00	2.00			JAN 4	629.32	629.32
JAN 4	15.29	150.00			JAN 4	99.50	99.50
JAN 4	14.71				JAN 4	60.36	60.36
JAN 4	28.27						
JAN 4	422.00				JAN 4	935.12	935.12
JAN 4	22.15	7.00					
JAN 4	24.27	35.34			JAN 4	160.34	160.34
JAN 4	16.58	37.15			JAN 5	92.29	92.29
JAN 4	49.65	56.64			JAN 5	29.67	29.67
JAN 4	401.50	36.17					
JAN 4	77.05	101.51	JAN 4	1,059.50			
JAN 4	1.95	22.70					
JAN 5	11.50	16.20			JAN 4	160.34	160.34
JAN 5	33.96	28.66			JAN 5	92.29	92.29
JAN 5	34.78	44.91			JAN 5	29.67	29.67
JAN 5	46.91	150.00					
JAN 5	68.11	89.60			JAN 5	646.34	646.34
JAN 5	48.86						
JAN 5	125.30	63.43	JAN 5	3,195.00	JAN 5	1,572.96	1,572.96
JAN 5	56.97	75.00	JAN 5	160.51	JAN 5	1,733.47	1,733.47
					JAN 5	372.25	372.25
JAN 5	63.63	886.55					
JAN 5	14.71	203.63			JAN 7	38.71	38.71
JAN 7	19.88	10.00			JAN 7	3.76	3.76
JAN 7	34.90	74.60					
JAN 7	40.00	39.28					
JAN 7	5.49	29.46					
JAN 7	353.63	220.20					
JAN 7	29.04	26.15					
JAN 7	45.72	250.00					
JAN 7	60.00	4.99			JAN 7	1657.09	





THE NATIONAL BANK OF TACOMA  
Tacoma, Washington  
NAME American Wood Pipe Co.  
ADDRESS 80 3RD & CEDAR  
TACOMA, WASH

Date	CHECKS IN DETAIL			Date		Balance	Proof
				Balance Brought Forward	Deposits Brought Forward		
JAN 7	43.95	161.15	19.50	JAN 7	55.10	1,557.09	1,557.09
JAN 7	39.84	34.16	32.10	JAN 7	1,670.00	1,501.99	1,501.99
JAN 7	18.81	3.55		JAN 7		14.95	14.95
JAN 8	6.98			JAN 8	225.00	7.97	7.97
JAN 8	594.54	55.86	62.88	JAN 8	2,185.00		
JAN 8	24.62	20.70	168.50	JAN 8			
JAN 8	167.36	300.00	60.75				
JAN 8	29.46	49.30	28.50				
JAN 8	193.14	305.55		JAN 8	308.55	356.76	356.76
JAN 8	487.26			JAN 8		175.05	175.05
JAN 9	2.25	84.30	50.00	JAN 9		36.50	36.50
JAN 9	13.00			JAN 9		25.50	25.50
JAN 9	136.28	60.75	319.73				
CHEC 9	.50	125.00	140.00				
JAN 9	200.00			JAN 9	1,830.00	956.76	956.76
JAN 9	308.55	343.00	60.44	JAN 9		164.23	164.23
JAN 10	11.00	43.26	93.66	JAN 10		16.31	16.31
JAN 10	15.00			JAN 10	200.63	1.31	1.31
				JAN 10	2,715.00	201.94	201.94
RET 10	125.00	612.65	425.00				
JAN 10	29.90	25.14	150.00	JAN 10		1,106.27	1,106.27
JAN 10	117.34	223.91	96.75	JAN 10		81.22	81.22
JAN 10	1,027.05			JAN 11		56.22	56.22
JAN 11	25.00			JAN 11		43.01	43.01
JAN 11	10.00	3.21		JAN 11	325.00	16.41	16.41
JAN 11	26.60	175.00	150.00	JAN 11		233.59	233.59
CHEC 11	250.00			JAN 11	226.41	239.32	239.32
CHEC 11	232.14			JAN 11		262.32	262.32
JAN 11	25.00			JAN 12	186.00		
JAN 11	29.10	8.55	57.62	JAN 12	199.28		
RET 12				JAN 12	1,112	17.61	17.61
JAN 12	43.05	53.05	60.00				
JAN 12	56.56	100.00		JAN 12		293.87	293.87
JAN 14	4,596.40 1st			JAN 14	1,162.11	175.18	175.18
CHEC 14	13,216.66			JAN 14	17,100.00	85.18	85.18
JAN 14	90.00			JAN 14		2.18	2.18
JAN 15	76.00	6.00		JAN 15	5,365.00	2,349.25	2,349.25
JAN 15	3,017.69						
JAN 16	55.09	175.00	15.90	JAN 16		1,559.55	1,559.55
JAN 16	7.90	16.55	179.30	JAN 16		1,789.55	1,789.55
JAN 16	100.00			JAN 16		1,699.55	1,699.55
JAN 16	90.00			JAN 16		1,550.51	1,550.51
JAN 16	50.00	42.82	56.32	JAN 16	750.10	2,280.61	2,280.61
				JAN 17			
JAN 17	10.00	3.30	31.35	JAN 17		2,144.53	2,144.53
JAN 17	91.45			JAN 17		934.18	934.18
JAN 17	598.71	2,500.00					



SHEET NO. 2

Date	CHECKS IN DETAIL		Date Deposits		Balance	Proof
			Balance brought			
			Forward	JAN 17		
JAN 17	1,330.40	274.14	179.30	JAN 17	934.16	934.16
JAN 17	4.00	28.00	87.79	JAN 17	106.81	
JAN 18	278.38	236.41	JAN 17	669.47	648.47	648.47
JAN 18	1.40		JAN 17	2,710.00	JAN 17	80.88
JAN 18	46.00		JAN 18		JAN 18	79.48
JAN 18	100.79	536.48	52.83	JAN 18	JAN 18	793.79
			200.00		JAN 18	224.57
				JAN 18	121.34	103.23
JAN 19	756.46	41.05	300.00	JAN 18	103.23	
JAN 19	100.00	50.00	250.50			
JAN 19	38.38	100.00	35.13	JAN 19	100.36	
JAN 19	39.43	34.80	250.00	JAN 19	68.43	
JAN 19	500.00	150.00	28.78	JAN 19	2790.00	
JAN 19	25.79	62.90	8.55			
JAN 19	105.03	11.84	6.10	JAN 19	JAN 19	30.18
				JAN 19	JAN 19	32.72
JAN 19	46.03	67.53	17.57	JAN 19	JAN 19	44.56
JAN 19	54.31	11.84	62.90	JAN 19	JAN 19	53.11
JAN 19	8.55			JAN 19	JAN 19	7.08
JAN 21	1,834.38	Lat		JAN 19	215.62	215.62
JAN 21	500.00		JAN 21	500.00	JAN 21	284.38
JAN 21	633.85	Lat		JAN 21	1550.00	1550.00
JAN 21	405.16		JAN 21	3375.00	JAN 21	2050.00
JAN 21	75.00			JAN 21	1825.00	1325.00
JAN 22	18.50	17.50	36.00	JAN 21	891.18	691.15
JAN 22	6.50	15.20	10.45	JAN 21	285.99	285.99
JAN 22	53.91	25.00		JAN 21	81.84	81.84
JAN 22	84.65			JAN 22	27.93	27.93
JAN 22	100.00	200.00	150.00	JAN 22	744.56	744.56
		237.86		JAN 22	765.42	765.42
JAN 22	525.54	108.40	2.00	JAN 22	239.00	239.00
JAN 22	3.96	60.75	39.99			
JAN 22	48.00			JAN 22	23.22	23.22
JAN 23	49.31	15.00		JAN 22	16.77	16.77
JAN 23	49.59	49.31	10.00	JAN 23	1.77	1.77
				JAN 23	8.15	8.15
JAN 23	10.00	70.15	7.78	JAN 23	1.85	1.85
JAN 23	462.91	125.00	11.50	JAN 23	78.30	78.30
JAN 23	89.91	44.10	106.32	JAN 23	489.47	489.47
JAN 23	60.75	39.18		JAN 24	11.97	
JAN 23	699.78					
JAN 24	38.19	43.78	15.00	JAN 23		
JAN 24	34.53	70.00	275.00	JAN 24		

PLAINTIFF'S EXHIBIT "21", page 3





## THE NATIONAL BANK OF TACOMA

Tacoma, Washington

NAME

AMERICAN WOOD PIPE CO.

ADDRESS

90 32nd &amp; CEDAR

TACOMA WASH

Date	CHECKS IN DETAIL		DATE	Deposits	DATE	BALANCE	PROOF
			Balance Forward	Brought	JAN 24	11.97	11.97
JAN 24	8.67						
JAN 24	125.00	25.00					
JAN 24	60.00	100.00					
JAN 24	331.29	376.51					
JAN 24	14.55	14.65					
JAN 24	169.31						
JAN 25	80.00	64.20					
JAN 25	83.39	60.00					
JAN 25	89.19	11.50					
JAN 25	28.52	160.00					
JAN 26	6.50	22.80					
CHG 26	1.75	341.56					
RET 26	69.45	31.98					
JAN 26	426.08	48.00					
CHG 28	7.94	38.00					
JAN 28	10.00	34.18					
JAN 28	99.36						
JAN 28	65.78						
CHG 28	20.00	185.10					
JAN 28	115.00	27.92					
JAN 28	1.34	41.68					
JAN 28	20.06	35.00					
JAN 28	492.23	556.93					
JAN 29	10.00	39.18					
JAN 29	50.00						
JAN 29	100.00	82.00					
JAN 29	35.19						
JAN 29	100.00						
JAN 30	250.57	200.00					
JAN 30	753.55						
JAN 30	100.00	5.79					
JAN 30	25.00	50.00					
JAN 30	11.50						
JAN 30	150.00						
JAN 30	568.51						
CHG 31	1.00						
JAN 31	43.00	60.00					
JAN 31	36.00	200.00					
FEB 1	2.60	30.00					
FEB 1	486.24	60.00					
JAN 24	25.23						
JAN 24	138.00						
JAN 24	394.14						
JAN 24	70.00						
JAN 24	142.95						
JAN 25	10.40						
JAN 25	.75						
JAN 25	39.25						
JAN 25	205.95						
JAN 25	311.77						
JAN 25	4.00						
JAN 25	15.00						
JAN 25	65.78						
JAN 25	125.00						
JAN 25	65.78						
JAN 25	96.77						
JAN 25	500.00						
JAN 25	62.55						
JAN 25	125.00						
JAN 25	27.92						
JAN 25	96.77						
JAN 25	35.00						
JAN 25	556.93						
JAN 25	39.18						
JAN 25	82.00						
JAN 25	200.00						
JAN 25	250.57						
JAN 25	753.55						
JAN 25	100.00						
JAN 25	25.00						
JAN 25	11.50						
JAN 25	150.00						
JAN 25	568.51						
JAN 25	1.00						
JAN 25	43.00						
JAN 25	36.00						
JAN 25	2.60						
JAN 25	486.24						
JAN 24	1,970.00						
JAN 24	1,310.29						
JAN 24	659.71						
JAN 24	391.20						
JAN 25	359.28						
JAN 25	68.92						
JAN 25	.37						
JAN 26	962.09						
JAN 26	402.40						
JAN 26	132.14						
JAN 26	197.92						
JAN 26	232.99						
JAN 26	71.26						
JAN 26	270.93						
JAN 26	1,889.07						
JAN 26	1,789.07						
JAN 26	1,338.50						
JAN 26	584.95						
JAN 26	697.10						
JAN 26	547.10						
JAN 26	21.41						
JAN 26	22.41						
JAN 26	452.59						
JAN 26	42.67						
JAN 26	8.98						
JAN 26	656.26						

PLAINTIFF'S EXHIBIT "21", page 4



PLAINTIFF'S EXHIBIT No. 22.

Tacoma, Wash. Jan. 15, 1929.

Deposited with

THE NATIONAL BANK OF TACOMA.

Subject to concitions on reverse of this form  
For Credit of

AMERICAN WOOD PIPE COMPANY.

Please list each check separately, describing as  
requested on back hereof.

	Dollars	Cents
Gold .....		
Silver and Fractional .....		
Currency .....		
Description of checks .....		
Note .....	3,545.00	
Note .....	1,820.00	

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PLAINTIFF'S EXHIBIT No. 23.

Tacoma, Wash. Jan. 21, 1929.

Deposited with

THE NATIONAL BANK OF TACOMA.

Subject to conditions on reverse of this form

For Credit of

AMERICAN WOOD PIPE COMPANY.

Please list each check separately, describing as requested on back hereof.

	Dollars	Cents
Gold .....		
Silver and Fractional .....		
Currency .....		
Description of checks .....		
Note .....	3,375.00	

[155]

**CLASSIFICATION**

A. On Demand, paper with one or more individual or firm names (not secured by collateral).

B. On Demand, secured by stock and bonds.

C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.

D. On time, paper with one or more individual or firm names (not secured by collateral).

E. On time, secured by stocks and bonds.

F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.

G. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

**Reserve Act, as amended:**

H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended.

I. For debts previously contracted (Section 5137, R.S.U.S.)—

1. Farm lands.

2. All other real estate loans—

A. Farm lands.

B. Other real estate.

J. Acceptances of other banks discounted.

K. Acceptances of this bank purchased or discounted.

L. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

# THE NATIONAL BANK OF TACOMA

SHEET NO. 16

NAME *American Wood Pipe Co*

ADDRESS *Assignments*

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
100540	7 25	Amer Dist Steam Co	100540	D	D	8%	7	L	900	June 18 78	782245		5-14-78		
136376	7 25	Grays Harbor Pulp Co	136376	D	D	50%	7	L	3675	July 20 78	782295		5-14-78		
7936	7 25	A B Fossum & Co	7936	D	D	11%	7	L	1510	June 18 78	782295		5-15-78		
783736	7 25	Geo M Cooke Co	783736	D	D	7%	7	L	800	May 78	78183420		5-16-78		
783736	7 25	Grays Harbor Pulp Co	783736	D	D	50%	7	L	4100	July 20 78	182433		5-16-78		
783736	7 25	Geo M Cooke Co	783736	D	D	7%	7	L	3375	Sept 10 78	87610		5-17-78		
8775	7 25	Geo M Cooke Co	8775	D	D	5989	7	L	7610	Sept 10 78	190805		5-18-78		
8775	7 25	Amer Dist Steam Co	8775	D	D	3%	7	L	1010	June 1 78	197665		5-18-78		
506368	7 25	Geo M Cooke Co	506368	D	D	7%	7	L	3175	Sept 10 78	132955		5-19-78		
137612	7 25	Grays Harbor Pulp Co	137612	D	D	47%	7	L	3910	July 20 78	197500		5-21-78		
137612	7 25	"	137612	D	D	1335	7	L	1860	June 21 78	195655		5-22-78		
77953	7 25	"	77953	D	D	3738	7	L	3100	July 20 78	780950		5-22-78		
150947	7 25	Amer Dist Steam Co	150947	D	D	7%	7	L	1375	Aug 7 78	780340		5-23-78		
18649	7 25	Grays Harbor Pulp Co	18649	D	D	7%	7	L	7550	July 20 78	7805190		5-23-78		
504834	7 25	Geo M Cooke Co	504834	D	D	8108	7	L	3000	Oct 8 78	210090		5-24-78		
271071	7 25	Amer Laundry Mach Co	271071	D	D	670	7	L	7300	June 6 78	212540		5-25-78		
17831	7 25	Hill Cattle Co	17831	D	D	470	7	L	1800	June 4 78	216735		5-26-78		
72488	7 25	Grays Harbor Pulp Co	72488	D	D	3439	7	L	3050	July 20 78	212440		5-28-78		
570438	7 25	"	570438	D	D	2965	7	L	2675	July 20 78	218990		5-29-78		
21653	7 25	Hill Cattle Co	21653	D	D	563	7	L	2225	June 6 78	218415		5-29-78		
21766	7 25	"	21766	D	D	502	7	L	2150	June 6 78	217315		5-31-78		
83223	7 25	Grays Harbor Pulp Co	83223	D	D	3980	7	L	7300	Aug 22 78	216300		5-31-78		
7184	7 25	City of Philipburg	7184	D	D	765	7	L	1095	June 7 78	219425		6-1-78		
90507	7 25	A B Fossum & Co	90507	D	D	107	7	L	1100	May 31 78	223080		6-2-78		
124882	7 25	L F Duvergne Co	124882	D	D	336	7	L	1080	June 13 78	225420		6-2-78		
150759	7 25	Amer Dist Steam Co	150759	D	D	1340	7	L	1350	July 19 78	22750594		6-5-78		
138094	7 25	Grays Harbor Pulp Co	138094	D	D	4381	7	L	2450	July 22 78	22741094		6-5-78		
16350	7 25	"	16350	D	D	5014	7	L	3175	Aug 22 78	227444594		6-7-78		
136048	7 25	"	136048	D	D	11596	7	L	2800	Feb 25 78	22547094		6-8-78		
											19378094		6-9-78		



## THE NATIONAL BANK OF TACOMA

NAME *American Wood Pipe Co*ADDRESS *Assignments*

## CLASSIFICATION

- A. On Demand, paper with one or more individual or firm names (not secured by collateral).  
 B. On Demand, secured by stock and bonds.  
 C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D. On time paper with one or more individual or firm names (not secured by collateral).  
 E. On time, secured by stocks and bonds.  
 F. On time secured by other personal securities, including merchandise, warehouse receipts etc.  
 G. Secured by improved real estate under authority of Section 24, Federal

- Reserve Act, as amended:  
 1. On farm land.  
 2. On other real estate.  
 H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 5137, R.S.U.S.).  
 A. Farm lands.  
 B. Other real estate.  
 2. All other real estate loans—  
 A. Farm lands.  
 B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
6733	6 7 28	Town Harbor Lbr Co	241695	0	0		7	L	855	June 19 28	19328092				
59	6 1 28	Jas N Coyne	506637	0	0	5696	7	L	2375	Oct 8 28	19635892		6/11 28		
60	6 4 28	Grays Harbor Pulp Co	66613	0	0	3917	7	L	2550	Aug 22 28	19967592		6/13 28		
61	6 4 28	Amer Dist Steam Co	160413	0	0	519	7	L	1160	June 21 28	20288592		6/12 28		
59997	11 17 27	Shuler Lbr Grange & Log	9038	0	0	8728	7	L	135092	June 30 28	20137092		6/15 28		
6745	6 5 28	Amer Dist Steam Co	160513	0	0	1824	7	L	1340	Aug 14 28	20293092		6/15 28		
4	6 5 28	Grays Harbor Pulp Co	41688	0	0	13883	7	L	3400	Feb 25 28	202747592		6/16 28		
66860	6 6 28	Jas N Coyne	203735	0	0		7	L	2410	Oct 8 28	202954592		6/18 28		
1	6 6 28	Grays Harbor Pulp Co	125670	0	0	12496	7	L	3075	Feb 25 28	2021149092		6/19 28		
2	6 6 28	Town of Ecklamet	48616	0	0	1639	7	L	1095	Aug 22 28	2021466592		6/20 28		
66802	6 7 28	Grays Harbor Pulp Co	372066	0	0	11729	7	L	2900	Feb 25 28	2018444092		6/21 28		
3	6 7 28	Sh. Lbr & Bucknell Co	28326	0	0	462	7	L	1230	June 26 28	2018845592		6/22 28		
66114	6 8 28	Grays Harbor Pulp Co	172468	0	0	11974	7	L	2975	Feb 25 28	2018981592		6/23 28		
66107	6 11 28		135439	0	0	12197	7	L	3075	Feb 25 28	2019571592		6/25 28		
47	6 13 28	City of Aberdeen	54712	0	0	721	7	L	1325	July 11 28	2019431592		6/25 28		
26	6 13 28	Jas N Coyne	301988	0	0		7	L	3075	Nov 17 28	2019308592		6/26 28		
67202	6 14 28	Geo W. Luffe Inc	222199	0	0	1008	7	L	3700	June 28 28	2019708592		6/26 28		
6	6 14 28	Town Harbor Lbr Co	38739	0	0	214	7	L	685	June 30 28	2019907092		6/27 28		
67216	6 15 28	Geo W. Luffe Inc	48342	0	0	899	7	L	3560	June 28 28	2019171592		6/28 28		
6737	6 16 28	New Council Copper		0	0	758	7	L	3000	June 29 28	2018871592		6/29 28		
2	6 16 28	City of Aberdeen	69981	0	0	653	7	L	1315	July 11 28	2019153092		6/29 28		
3	6 16 28	Amer Lumbering Mch	271335	0	0		7	L	3700	July 7 28	20186390		6/30 28		
6732	6 18 28	N B Wate Lbr Co	702626	0	0	401	7	L	1085	July 7 28	20183470		7/1 28		
5	6 18 28	City of Aberdeen	56251	0	0	569	7	L	1275	July 11 28	20189090		7/2 28		
67416	6 19 28	Nevada Council Copper	102572	0	0	816	7	L	3225	July 2 28	20191955		7/5 28		
7	6 19 28	City of Aberdeen	69851	0	0	526	7	L	1275	July 11 28	20195890		7/6 28		
67426	6 20 28	Chas E Bartlett & Co	58562	0	0	339	7	L	1160	July 5 28	20192745		7/7 28		
6	6 20 28	New Council Copper Co	72290	0	0	471	7	L	2015	July 2 28	20196770		7/7 28		
67422	6 31 28	Cayman Lumber Co	24247	0	0	359	7	L	2100	June 28 28	20196705		7/9 28		





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 E. On time, secured by stocks and bonds.  
 F. On time, secured by other personal securities, including merchandise, warehouse receipts etc.  
 G. Secured by improved real estate under authority of Section 24, Federal

Reserve Act, as amended:

1. On farm land.  
 2. On other real estate.  
 II. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 5127, R. S. U.S.A.)—  
 A. Farm Lands.  
 B. Other real estate.  
 2. All other real estate loans—  
 A. Farm Lands.  
 B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

## THE NATIONAL BANK OF TACOMA

SHEET NO. 36

NAME

American Wood Pipe Co

ADDRESS

Assignments

Number	Date of Item	MAKER	ENDORSEES	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
6752	6 21 78	Grays Harbor Pulp Co		D	D	7700	7	L	1910	Feb 78	29195940		7-11-78		
6757	6 22 78	Bay View Ldg Co	691 77	D	D	8588	7	L	4015	Oct 10 78	161710		7-11-78		
6763	6 23 78	Nat Paper Prod Co		D	D	123	7	L	460	Jul 7 78	201710		7-11-78		
6	6 23 78	Carl & Nylander Co		D	D	50	7	L	900	Jan 78	28195990		7-11-78		
6770	6 25 78	Jas H Coyne		D	D	19930	7	L	5400	Feb 78	29188475		7-12-78		
6775	6 26 78	Grays Harbor Pulp Co	141 71	D	D	147	7	L	4000	Feb 78	29187475		7-12-78		
6779	6 27 78	Austin Lbr Co	3194	D	D	602	7	L	755	Aug 7 78	191775		7-13-78		
7	6 27 78	J H. Anvil	360 78	D	D	3994	7	L	1730	Dec 11 78	189670		7-13-78		
6783	6 28 78	H O & R L Hedges	670 49	D	D	703	7	L	695	Jan 12 78	1919440		7-14-78		
7	6 28 78	Swan Harbor Lbr Co	927 44	D	D	330	7	L	1060	Jul 14 78	195870		7-16-78		
3	6 28 78	Austria Lbr Co	106 54	D	D	615	7	L	790	Aug 7 78	194700		7-17-78		
6789	6 28 78	Wind Bros Const Co	171389	D	D		7	L	2815	Sept 11 78	194870		7-17-78		
6794	6 30 78	Swan Harbor Lbr Co	33045	D	D	298	7	L	1095	Jul 14 78	194600		7-18-78		
8	6 30 78	Shuler Lbr Co & S Co	795008	D	D	60	7	L	780	Jul 11 78	197775		7-18-78		
9	6 30 78		62148	D	D	102	7	L	480	Jul 11 78	195975		7-19-78		
6796	7 2 78	Wind Bros Const Co	18671	D	D	246	7	L	1655	Sept 17 78	200165		7-19-78		
8	7 2 78	Shuler Lbr Co & S Co	54795	D	D	586	7	L	615	Aug 78	28150805		7-20-78		
6806	7 3 78	Jas H Coyne		D	D	15920	7	L	4500	Feb 21 78	2155096		7-20-78		
7	7 3 78	Swan Harbor Lbr Co	707484	D	D	318	7	L	1170	Jul 17 78	152815		7-23-78		
6808	7 3 78	The Concord Lumber Co	75641	D	D	648	7	L	2225	" 18 78	28156625		7-23-78		
3	7 5 78	Swan Harbor Lbr Co	67411	D	D	560	7	L	900	Aug 6 78	155075		7-24-78		
1	7 5 78	Austin Lbr Co	76269	D	D	595	7	L	900	" 8 78	28156330		7-24-78		
6817	7 6 78	Boon Water Corp	99643	D	D	1383	7	L	560	Nov 10 78	28159820		7-25-78		
80	7 6 78	State of Wash	Truck	D	D	753	7	L	1130	Aug 10 78	28153750		7-26-78		
1	7 6 78	Cont Pipe Mfg Co	37399	D	D	3159	7	L	2225	Sept 17 78	28160450		7-27-78		
67373	6 16 78	Amr Lumber Mar Co	771335	D	D	1836	7	L	1600	July 22 78	165735		7-28-78		
6821	7 7 78	Cont Pipe Mfg Co	6159	D	D		7	L	2000	Sept 17 78	28166660		7-30-78		
3	7 7 78	Buckman Lbr Co	45536	D	D		7	L	2025	Oct 31 78	28169780		7-31-78		
68197	4 26 78	Jas H Coyne	507767	D	D	6370	7	L	2350	Aug 10 78	172700		8-1-78		



NAME American Wood Pipe Co

ADDRESS Assignment

- CLASSIFICATION**
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 B. On Demand, secured by stock and bonds.  
 C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D. On time, paper with one or more individual or firm names (not secured by collateral).  
 E. On time, secured by stocks and bonds.  
 F. On time, secured by other personal securities, including merchandise, warehouse receipts etc.  
 G. Secured by improved real estate under authority of Section 24, Federal

- Reserve Act, as amended:
1. On farm land.  
 2. On other real estate.  
 H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 317, R.S.U.S.).  
 A. Farm Lands.  
 B. Other real estate.  
 2. All other real estate loans—  
 A. Farm Lands.  
 B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED	
											Amount	Date	PAYER	Amount
68717	7 9 78	Whelan Lumber Supply Co	69756	D	D	70	7	L	780	July 23 78				
8	7 9 78	Town Harbor Lbr Co	713071	D	D	322	7	L	740	Aug 6 78				
9	7 9 78	Cont Pipe Mfg Co	16878	D	D	7	7	L	1978	Sep 24 78				
70	7 9 78	E. L. Suddart Co Tacoma	5709	D	D	534	7	L	950	Aug 8 78				
68342	7 11 78	Jas A. Capen		D	D	15726	7	L	4500	Feb 21 79				
3	7 11 78	Talachi Mfg Co		D	D	550	7	L	765	Aug 17 78				
68408	7 13 78	Whelan Lbr Co Supply Co	975010	D	D	94	7	L	370	July 26 78				
9	7 13 78	State Sup of Fisheries	67006	D	D	614	7	L	1130	Aug 10 78				
10	7 13 78	Cont Pipe Mfg Co	97188	D	D	7	7	L	7340	PA				
11	7 13 78	Laguna Lbr Co		D	D	259	7	L	460	Aug 11 78				
68433	7 14 78	Town of Seattle	16596	D	D	7	7	L	1700	Aug 11 78				
14	7 14 78	Sabbey & McNeil	18861	D	D	440	7	L	900	Aug 11 78				
5	7 14 78	Town Harbor Lbr Co	505983	D	D	403	7	L	770	Aug 6 78				
68484	7 16 78	Cont Pipe Mfg Co	79073	D	D	7	7	L	7740	Oct 8 78				
5	7 16 78	Whelan Lbr Co & S Co	476708	D	D	188	7	L	690	July 30 78				
68527	7 17 78	Cont Pipe Mfg Co	174877	D	D	7	7	L	2175	Nov 5 78				
68555	7 18 78	Coast Tr & Lumber Co	939727	D	D	93	7	L	700	Aug 11 78				
6	7 18 78	Western Colorado Lbr Co		D	D	1879	7	L	7475	Aug 25 78				
68588	7 19 78	Town Harbor Lbr Co	74949	D	D	8747	7	L	7710	Feb 25 79				
9	7 19 78	Whelan Lbr Co & S Co	769800	D	D	178	7	L	610	Aug 3 78				
90	7 19 78	Town Harbor Lbr Co	171883	D	D	286	7	L	970	Aug 4 78				
68677	7 20 78	Cont Pipe Mfg Co	47350	D	D	7	7	L	7775	Nov 19 78				
8	7 20 78	Amer Dist. Lbr Co	175197	D	D	733	7	L	1300	Aug 18 78				
9	7 20 78	City of Centralia	Trunk	D	D	135	7	L	315	Aug 11 78				
30	7 20 78	Town of Battle Ground	L.B.L.	D	D	517	7	L	350	Oct 1 78				
68739	7 23 78	Bunker Hill Lbr Co	44049	D	D	350	7	L	1700	Aug 7 78				
40	7 23 78	Whelan Lbr Co & S Co	975010	D	D	89	7	L	325	Aug 6 78				
1	7 23 78	Coast Tr & Lumber Co	72670	D	D	105	7	L	785	Aug 11 78				
68778	7 24 78	State Sup of Fisheries	Trunk	D	D	777	7	L	780	Sept 13 78				





**CLASSIFICATION**  
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 B. On Demand, secured by stock and bonds.  
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 D. On time, paper with one or more individual or firm names (not secured by collateral).  
 E. On time, secured by stocks and bonds.  
 F. On time secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

Reserve Act, as amended:  
 1. On farm land.  
 2. On other real estate.  
 H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 517, R. & U.S.A.)—  
 A. Farm lands.  
 B. Other real estate.  
 2. All other real estate loans—  
 A. Farm lands.  
 B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

# THE NATIONAL BANK OF TACOMA

SHEET NO.

NAME *American Road Pipe Co*

ADDRESS *Aspern*

Number	Date of Item	MAKER	ENDORSEES	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
61779	7 28	Twin Harbor Lbr Co	850 26	0	0	637	7	L	1075	Aug 25-78	176835		8-1-78		
68807	7 28	Shaffer Box Co	74 29	0	0	3772	7	L	1490	Nov 15-78	175778		8-3-78		
68855	7 28	Costal Tel. Case Co	L 6 L	0	0	151	7	L	310	Aug 70-78	178215		8-3-78		
9	7 26	Whulworth B & Sup Co	975 40	0	0	145	7	L	490	Aug 10-78	177795		8-2-78		
68894	7 27	American Dist Steam	716	0	0	107	7	L	500	Aug 7-78	179880		8-2-78		
5	7 27	Shaffer Box Co	673 84	0	0	3008	7	L	1700	Oct 76-78	183535		8-6-78		
68979	7 28	Amer Dist Stegar	724	0	0	1778	7	L	900	Oct 9-78	177940		8-7-78		
30	7 28	Re Nativ Ste Sup Co		0	0			L	685	Aug 9-78	179050		8-7-78		
1	7 28	Shaffer Box Co	696 01	0	0	5935	7	L	2725	Nov 15-78	180615		8-8-78		
2	7 28	Whulworth B & Sup Co	642 22	0	0	788	7	L	928	Aug 13-78	187765		8-9-78		
68984	7 30	Shaffer Box Co	663 80	0	0	3391	7	L	1615	Nov 15-78	173385		8-10-78		
69038	7 31	A B Towner & Co	L 6 L	0	0	488	7	L	570	Sept 13-78	17090183		8-11-78		
9	7 31	Twin Harbor Lbr Co	532 02	0	0	595	7	L	1725	Aug 25-78	17912183		8-11-78		
69040	7 31		521 76	0	0	789	7	L	825	Aug 17-78	17557183		8-13-78		
69060	8 1	A A Browning Lbr Co	693 02	0	0	98	7	L	370	Aug 16-78	17527183		8-14-78		
	8 1	Cost Pipe Mfg Co	1700 18	0	0			L	2200	Aug 10-78	17832183		8-15-78		
	7 8	Twin Harbor Lbr Co	107 7	0	0	149	7	L	850	Aug 7-78	17795183		8-16-78		
69111	8 2		516 34	0	0	683	7	L	975	Feb 21-78	18096683		8-16-78		
	7 8 2	Jack A Coyne	507 39	0	0	9340	7	L	3160	Nov 26-78	18371683		8-17-78		
69238	4 27	Lockwood Beauty Co	628 59	0	0	1781	7	L	760	Nov 26-78	1818191683		8-18-78		
69152	8 3		670 29	0	0	5577	7	L	2490	Oct 8-78	18539183		8-18-78		
69190	8 4	Cost Pipe Mfg Co	713 152	0	0	2724	7	L	2155	Sept 1-78	18246683		8-20-78		
1	8 4	A A Rose	L 6 L	0	0	259	7	L	430	Sept 75-78	18559683		8-20-78		
69234	8 6	J E Schbauer	Trunk	0	0			L	1800	Aug 22-78	18597683		8-21-78		
5	8 6	Whulworth B & Sup Co	666 37	0	0	2422	7	L	775	Oct 76-78	17255183		8-22-78		
6	8 6	Shaffer Box Co	646 53	0	0	3001	7	L	2225	Nov 15-78	17653183		8-22-78		
7	8 6	A Halroyd	Trunk	0	0	618	7	L	350	Aug 10-78	17560183		8-23-78		
8	8 6	Twin Harp with Co	417 85	0	0	93	7	L	1190	Sept	17806683		8-23-78		
69244	8 7	Allen & Hutchinson	Lundani	0	0	185	7	L	380	Sept 1-78	18052183		8-24-78		



## THE NATIONAL BANK OF TACOMA

NAME

American Wood Pipe Co

ADDRESS

Assignments

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 D. On time, paper with one or more individual or firm names (not secured by collateral).  
 E. On time, secured by stocks and bonds.  
 F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G. Secured by improved real estate under authority of Section 24, Federal

## Reserve Act, as amended:

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 2. On other real estate.  
 II. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 217, R.S.U.S.).  
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 2. All other real estate loans—  
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											Amount	Date	PAYER	Amount	Date of Payment
69295	8 7 78	Natl Bank of Lp Co	L. C. L.	D	D		7	L	730	Sept 7 78					
69331	8 8 "	Dept of Interior		D	D	157	7	L	670	Aug 21 78					
78	8 8 "	Sum A. Lum Lbr Co	103874	D	D		7	L	2335	Aug 16 78					
38	8 8 "	Kill Sattle Co	L. C. L.	D	D	80	7	L	460	Aug 17 78					
68930	7 78	Pac. Natl Bk of Dep't	501754	D	D	718	7	L	535	Oct 2 78					
69376	8 9 "	Sum A. Lum Lbr Co	63380	D	D	1750	7	L	7300	Sept 17 78					
65239	4 78	Joe A. Brown	77411	D	D	2160	7	L	570	Sept 10 78					
69393	8 10 "	Sum A. Lum Lbr Co	77411	D	D	3889	7	L	1980	Nov 19 78					
68133	7 12 "	Town of Trinita	16596	D	D	167	7	L	137683	Sept 10 78					
69437	8 11 "	J. E. Schlosser	Truck	D	D		7	L	630	Oct 19 78					
3	11 "	Town of Eatonville	L. C. L.	D	D	2907	7	L	1590	Nov 13 78					
69481	4 13 "	City of Seattle	L. C. L.	D	D	336	7	L	775	Oct 29 78					
2	13 "	Sum A. Lum Lbr Co	15769	D	D	2170	7	L	3100	Sept 17 78					
69557	14 "	Amer Diet Store Co	L. C. L.	D	D	91	7	L	760	Sept 1 78					
8	14 "	Whitstone Coal Dist	33289	D	D	150	7	L	860	Aug 23 78					
9	14 "	Barnier Lumber & Lumber Co		D	D	50	7	L	170	Aug 23 78					
69601	15 "	Western Coal Co		D	D	389	7	L	2000	Aug 25 78					
2	15 "	Shuler Lumber & Supply Co	69359	D	D	732	7	L	850	Aug 29 78					
69337	8 "	Sum A. Lum Lbr Co	103874	D	D	1678	7	L	1970	Sept 17 78					
69635	16 "	Suburban Water Co	Truck	D	D	367	7	L	675	Sept 13 78					
6	16 "	Sum A. Lum Lbr Co	73598	D	D	4977	7	L	7695	Nov 19 78					
69666	17 "	"	700147	D	D	3614	7	L	3380	Oct 11 78					
7	17 "	Travis Arthur Lumber	18898	D	D	90	7	L	930	Aug 22 78					
69701	18 "	Sum A. Lum Lbr Co	73744	D	D	6783	7	L	3475	Nov 19 78					
69750	18 "	H. A. Browning	69700	D	D	1173	7	L	1750	Sept 20 78					
7	20 "	State Supt of Fisheries		D	D		7	L	380	Sept 11 78					
69833	22 "	Dept of Commerce	930014	D	D	1507	7	L	2500	Sept 22 78					
4	24 "	A. B. Fossan & Co	76387	D	D	633	7	L	1480	Sept 13 78					
69870	23 "	J. E. Schlosser	Truck	D	D		7	L	1010	Nov 30 78					





- CLASSIFICATION**
- A. On Demand, paper with one or more individual or firm names (not secured by collateral).
- B. On Demand, secured by stock and bonds.
- C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
- D. On time, paper with one or more individual or firm names (not secured by collateral).
- E. On time, secured by stocks and bonds.
- F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.
- G. Secured by improved real estate under authority of Section 24, Federal

- Reserve Act, as amended:**
1. On farm land. 2. On other real estate.
- H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:
1. For debts previously contracted (Section 517, R.E.U.S.).
- A. Farm lands. B. Other real estate.
2. All other real estate loans—
- I. Acceptances of other banks discounted.
- J. Acceptances of this bank purchased or discounted.
- K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

# THE NATIONAL BANK OF TACOMA

SHEET NO. 60

NAME *American Road Pipe Co*

ADDRESS *Assignments*

AMERICAN ROAD PIPE CO. TACOMA, WASH. 91171

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
69871	8 23 78	Amer Dist Steam	261394	0	0	553	7	L	1555	Sept 10 78	1738	1683	8/20-78		
69913	8 24	St Michaels Mission	61599	0	0	2610	7	L	2200	Oct 7 78	1756	1683	8-20-78		
4 8 24	"	State Sup of Fisheries	27133	0	0	96	7	L	275	Sept 11 78	176	43183	8 27 78		
69965	8 25	St Michaels Mission	26250	0	0	21	7	L	1800	Oct 7 78	178	77183	8 28 78		
70004	8 27	Sullivan Mfg Co	77125	0	0	888	7	L	815	Oct 22 78	1799	7183	8 29 78		
70074	8 28	Whitworth Co & Sup Co	276903	0	0	95	7	L	375	Sept 10 78	181	71183	8 29 78		
3 8 28	"	St Michaels Mission	31357	0	0	2203	7	L	1965	Nov 5 78	186	14183	8-30-78		
70104	8 29	Bureau of Reclamation	L6L	0	0	79	7	L	315	Sept 11 78	185	06683	8-31-78		
5 8 29	"	Cont Pipe Mfg Co	81573	0	0	6232	7	Lo	2225	Dec 19 78	187	4783	9-1-78		
6 8 29	"	Postal Tel & Cable Co	72481	0	0	530	7	Lo	1250	Sept 20 78	186	97683	9-2-78		
70137	8 30	Cont Pipe Mfg Co	122427	0	0	7	7	Lo	1845	Nov 5 78	188	70683	9-2-78		
8 8 30	"	Jacob H. Boyer	88048	0	0	7	7	Lo	2035	Feb 21 79	188	6183	9-5-78		
70186	8 31	New Corp of Seattle	Bank	0	0	61	7	Lo	225	Sept 14 78	191	67183	9-5-78		
7 8 31	"	Whitworth Co & Sup Co	78109	0	0	7	7	Lo	1050	Sept 5 78	192	15683	9-6-78		
8 8 31	"	Ed Du Pont de Nemours	78822	0	0	7	7	Lo	650	Oct 3 78	192	61183	9-7-78		
70310	9 1	H. A. Browning Lb Co	84611	0	0	3259	7	Lo	1710	Dec 11 78	180	67871	9-10-78		
70187	8 31	Whitworth Co & Sup Co	0	0	0	7	7	Lo	950	Sept 15 78	181	77871	9-10-78		
70354	9 5	Turn A Lum Lb Co	14052	0	0	3695	7	Lo	2500	Nov 20 78	180	81871	9-11-78		
5 9 5	"	City of Big Timber	L6L	0	0	198	7	Lo	300	Oct 5 78	185	41871	9-12-78		
6 9 5	"	Local Co	"	0	0	76	7	Lo	240	Sept 20 78	182	46371	9-13-78		
70398	9 6	Salmon Empire Paper Co	402198	0	0	205	7	Lo	485	Oct 3 78	182	51871	9-13-78		
9 9 6	"	Turn. A. Lum Lb Co	145266	0	0	1361	7	Lo	2000	Oct 11 78	182	79371	9-12-78		
70449	9 7	Allen & Robinson	0	0	0	117	7	Lo	215	Oct 5 78	187	02371	9-12-78		
50 9 7	"	H. A. Browning Lb Co	0	0	0	490	7	Lo	600	Oct 19 78	186	40386	9-15-78		
68433	7 14	Town of Trinita	16596	0	0	7	7	Lo	105371	Oct 13 78	186	47386	9-15-78		
66055	5 17	Jacob H. Boyer	506368	0	0	8686	7	Lo	2800	Oct 8 78	175	97886	9-17-78		
70552	9 10	Whitworth Co & Sup Co	43617	0	0	163	7	Lo	600	Sept 24 78	176	00886	9-17-78		
67897	6 24	Cont Pipe Mfg Co	171389	0	0	4081	7	Lo	310	Sept 17 78	178	000386	9-17-78		
70577	9 11	Trans Pacific System	L6L	0	0	268	7	Lo	285	Oct 29 78	179	45386	9-18-78		



## THE NATIONAL BANK OF TACOMA

NAME *American Hard Pipe Co*ADDRESS *Assignments*

- CLASSIFICATION**
- A. On Demand, payable with one or more individual or firm names (not secured by collateral).
- B. On Demand, secured by stock and bonds.
- C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
- D. On time, payable with one or more individual or firm names (not secured by collateral).
- E. On time, secured by stocks and bonds.
- F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.
- G. Secured by foregoing items under authority of Section 21, Federal

## Reserve Act, as amended:

1. On farm land.  
2. On other real estate.  
H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
1. For debts previously contracted (Section 517, R. S. U.S.).  
A. Farm Land.  
B. Other real estate.  
2. All other real estate loans—  
A. Farm Land.  
B. Other real estate.  
I. Acceptances of other banks discounted.  
J. Acceptances of this bank purchased or discounted.  
K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
70578	9 11 78	Amer Hard Pipe	9053	D	D			7 1/2	2075	Oct 9-1918	236886		9-19-18		
9 9 11		City of Tacoma	Druck	D	D	2527		7 1/2	650	Oct 1-1918	783945		9-20-18		
70678	9 14	Lark Co		D	D	537		7 1/2	135	Sept 21-1918	68858		9-20-18		
6 9 14		Twin Harbor Lbr Co	29938	D	D	1167		7 1/2	220	Oct 9-1918	1081058		9-21-18		
5 9 14		"	29057	D	D			7 1/2	1805	Sept 21-1918	101358		9-21-18		
6 9 14		"	78463	D	D	140		7 1/2	400	Sept 21-1918	107036		9-22-18		
7 9 14		"	97919	D	D			7 1/2	1070	"	1825086		9-22-18		
70666	9 13	Amer Hard Pipe	725	D	D	228		7 1/2	525	Oct 16-1918	180236		9-24-18		
7 9 13		Twin Harbor Lbr Co	80139	D	D	8607		7 1/2	1700	Oct 9-1918	1815476		9-25-18		
70778	9 14	Mile B. Water & Lbr Co	Druck	D	D	507		7 1/2	1700	Sept 15-1918	17913736		9-25-18		
4 9 14		Twin Harbor Lbr Co	24627	D	D			7 1/2	1630	Sept 21-1918	75536		9-25-18		
70878	8 31	Thule Lbr Co & S Co	78109	D	D	3107		7 1/2	330	Oct 15-1918	1837536		9-26-18		
70766	9 15	Mile B. Water & Lbr Co	Druck	D	D			7 1/2	1425	Oct 15-1918	1867906		9-26-18		
7 9 15		Sunset Lbr Co		D	D	507		7 1/2	360	Sept 21-1918	10621586		9-27-18		
67718	7 7	East Pipe Mfg Co	6157	D	D	2950		7 1/2	1100	Sept 21-1918	1807906		9-27-18		
70878	9 17	H. A. Browning Lbr Co	5631	D	D			7 1/2	1880	Oct 15-1918	1889586		9-27-18		
3 9 17		Grand Bros Lbr Co	Druck	D	D			7 1/2	240	Nov 8-1918	1920586		9-28-18		
70867	9 18	Twin Harbor Lbr Co	100557	D	D	667		7 1/2	575	Oct 27-1918	1945586		9-29-18		
8 9 18		Farmers Water Co	Druck	D	D	1		7 1/2	575	Sept 27-1918	1945586		10-1-18		
70907	9 19	Twin Harbor Lbr Co	30183	D	D	630		7 1/2	1200	Oct 16-1918	1915586		10-1-18		
3 9 19		Amer Laundry Mach Co	91760	D	D			7 1/2	1800	Oct 15-1918	19623736		10-2-18		
4 9 19		Twin Harbor Lbr Co	31625	D	D	328		7 1/2	1125	Oct 4-1918	1915586		10-3-18		
70678	9 18	"	47979	D	D	514		7 1/2	1000	Oct 17-1918	1957326		10-3-18		
70943	9 20	G. H. Ry Co	259497	D	D	20		7 1/2	200	Oct 22-1918	19725736		10-4-18		
4 9 20		Twin Harbor Lbr Co	5382	D	D			7 1/2	1200	Oct 15-1918	19040736		10-4-18		
5 9 20		Alcoa Bros & Co	Druck	D	D	40		7 1/2	1000	Sept 25-1918	19705736		10-4-18		
6 9 20		Orthopedic Lbr Co	LCH	D	D	168		7 1/2	1000	Oct 15-1918	19815736		10-4-18		
7 9 20		City of Tacoma	Druck	D	D	1567		7 1/2	400	Oct 15-1918	18606876		10-8-18		
70972	2	Twin Harbor Lbr Co		D	D	700		7 1/2	1000	Oct 22-1918	18895876		10-8-18		





**CLASSIFICATION**  
 A. Demand, paper with one or more individual or firm names (not secured by collateral).  
 B. Demand, secured by stock and bonds.  
 C. Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D. On time paper with one or more individual or firm names (not secured by collateral).  
 E. On time secured by stocks and bonds.  
 F. On time secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended:  
 1. On farm lands.  
 2. On other real estate.  
 H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 5127, R. S. U.S.).  
 A. Farm lands.  
 B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

**THE NATIONAL BANK OF TACOMA**  
 NAME *American Book Paper Co*  
 ADDRESS *Assignments*

SHEET NO. *62*

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
70994	9/21/25	Am. Press Steam Co	718-724	D	D		7 1/2		1440	10-16-25					
5	9/21/25	W. B. Browning Lbr Co		D	D		7 1/2		1760	10-14-25					
70625	9/12/25	Swinehart Bros Lbr Co	29057	D	D	577	7 1/2		64886	10-10-25					
70724	9/14/25	"	46827	D	D	306	7 1/2		29792	10-17-25					
71076	9/22/25	"	21791	D	D	965	7 1/2		1080	11-7-25					
7	9/22/25	Am. Press Steam Co	720	D	D		7 1/2		730	2-13-1927					
68249	7/9/25	Cont. Pipe & Supply Co	16828	D	D	3062	7 1/2		1325	10-1-25					
71084	9/22/25	Am. Press Steam Co	726	D	D	5932	7 1/2		1315	5-14-24					
69234	8/6/25	E. Schlosser		D	D	1867	7 1/2		302	10-15-25					
71102	9/22/25	Swinehart Bros Lbr Co	23879	D	D	1245	7 1/2		1230	10-31-25					
3	9/22/25	Swinehart Bros Lbr Co		D	D	1181	7 1/2		1190	11-15-25					
71134	9/22/25	Swinehart Bros Lbr Co	56956	D	D	163	7 1/2		1200	10-2-25					
71113	9/22/25	Miller & Watson Down Co	Druck	D	D	284	7 1/2		220	10-30-25					
71163	9/22/25	Swinehart Bros Lbr Co	503822	D	D	408	7 1/2		1115	10-6-25					
4	9/22/25	"	561268	D	D	1064	7 1/2		1300	11-7-25					
71199	9/27/25	Shaffert Box Co		D	D	1487	7 1/2		1350	11-15-25					
71200	9/27/25	Penn R.R. Co	47095	D	D	438	7 1/2		1185	10-16-25					
71229	9/28/25	Swinehart Bros Lbr Co		D	D	118	7 1/2		210	10-27-25					
71230	9/28/25	Penn R.R. Co	569570	D	D	310	7 1/2		860	10-16-25					
1	9/28/25	Beacon Paper Co	17072	D	D	1427	7 1/2		2225	10-21-25					
71241	9/29/25	W. B. Browning Lbr Co	50685	D	D	1220	7 1/2		2510	10-24-25					
68410	7/12/25	Cont. Pipe & Supply Co	97188	D	D	3921	7 1/2		2167	10-8-25					
71331	10/1/25	Swinehart Bros Lbr Co		D	D	1043	7 1/2		1125	11-19-25					
71374	10/2/25	Swinehart Bros Lbr Co	171920	D	D	3068	7 1/2		3450	11-16-25					
70185	8/31/25	Swinehart Bros Lbr Co		D	D	472	7 1/2		540	10-15-25					
71415	10/3/25	Swinehart Bros Lbr Co		D	D	1677	7 1/2		1090	12-21-25					
9	10/3/25	Swinehart Bros Lbr Co	132494	D	D		7 1/2		3000	11-30-25					
20	10/3/25	Swinehart Bros Lbr Co		D	D	57	7 1/2		202	11-10-25					
71476	10/4/25	Swinehart Bros Lbr Co		D	D		7 1/2		2525	11-27-25					



63 SHEET NO. THE BANK OF TACOMA

Assignments

- CLASSIFICATION
- A. On Demand, paper with one or more individual or firm names (not secured by collateral).
- B. On Demand, secured by stock and bonds.
- C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
- D. On time, paper with one or more individual or firm names (not secured by collateral).
- E. On time, secured by stocks and bonds.
- F. On time secured by other personal securities, including merchandise, warehouse receipts, etc.
- G. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended:
1. On farm land.
2. On other real estate.
- H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:
1. For debts previously contracted (Section 5137, R.S.U.S.).
2. All other real estate loans—
- A. Farm Lands.
- B. Other real estate.
- I. Acceptances of other banks discounted.
- J. Acceptances of this bank purchased or discounted.
- K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED	
										Amount	Date	PAYER	Date of Payment
10/4/28	Shaffert Bros		P	P	10.57	2		165	11-15-28	18479.74		10-9-28	
10/4/28	United Trust Co		P	P	190.7	2		2800	11-8-28	186330.76		10-9-28	
9/20/28	Quinn Tailors Lbbs	53824	P	P	896	7		5498	11-7-28	18189.90		10-10-28	
9/19/28	Am Ldy Mchf Co	92760	P	P	6047	7		360	10-20-28	185764.90		10-10-28	
10/5/28	Quinn Tailors Lbbs	502004	P	P	2537	7		1182	10-16-28	177496.90		10-11-28	
10/5/28	City of Bremerton	Druck	P	P	707	7		442	10-13-28	176443.78		10-13-28	
10/6/28	West Co	203725	P	P	7	7		2160	11-13-28	176843.78		10-13-28	
10/6/28	Cont Exp Mfg Co	29023	P	P	4137	7		12914	10-27-28	177783.78		10-13-28	
10/8/28	Am Ldy Mchf Co	715392	P	P	7	7		1700	11-16-28	175500.28		10-15-28	
10/8/28	W. H. M. Co	47471	P	P	7	7		3152	11-7-28	168849.28		10-16-28	
9/11/28	Am Ldy Mchf Co	9053	P	P	1837	7		772	10-16-28	1710799.28		10-16-28	
10/8/28	Shaffert Bros Co		P	P	11947	7		1535	11-15-28	170277.14		10-17-28	
10/10/28	Lewis & Clark	202	P	P	707	7		225	10-26-28	170332.14		10-17-28	
10/10/28	Decla Mining Co		P	P	527	7		200	10-22-28	170222.14		10-18-28	
10/10/28	State Salina Bank	Druck	P	P	867	7		125	11-14-28	171992.14		10-18-28	
10/10/28	Bank of Tacoma	202	P	P	4417	7		180	2-13-29	170892.14		10-19-28	
10/10/28	Wasson County Bank		P	P	3247	7		182	1-11-29	17267.14		10-19-28	
10/10/28	Comm of Puget	16596	P	P	7	7		720.59	11-13-28	167122.14		10-20-28	
10/10/28	City of Aberdeen	Druck	P	P	1367	7		200	11-17-28	16733.14		10-20-28	
10/10/28	Deu. H. M. Co		P	P	7	7		225	11-17-28	16733.14		10-22-28	
10/10/28	Deu. H. M. Co		P	P	257	7		720	1-19-28	16733.14		10-22-28	
10/10/28	Tacoma Bank	46813	P	P	1427	7		215	11-16-28	161002.14		10-23-28	
9/21/28	Nat. B. Co		P	P	7	7		35311	12-11-28	15332.14		10-24-28	
9/21/28	"	56431	P	P	2267	7		78404	1-15-29	154532.14		10-24-28	
10/15/28	Bank of Puget	Druck	P	P	7	7		210	11-20-28	154962.14		10-24-28	
10/15/28	Wasson County Bank	202	P	P	797	7		225	11-2-28	157217.14		10-25-28	
10/15/28	Deu. H. M. Co		P	P	507	7		100	10-21-28	153267.14		10-26-28	
9/21/28	Am Ldy Mchf Co		P	P	1782	7		1176	11-7-28	153467.14		10-26-28	
10/16/28	Cont Exp Mfg Co	35529	P	P	2451	7		1775	12-26-28	151083.72		10-27-28	

Druck 200.00





- CLASSIFICATION**
- A. On Demand, paper with one or more individual or firm names (not secured by collateral).
- B. On Demand, secured by stock and bonds.
- C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
- D. On time, paper with one or more individual or firm names (not secured by collateral).
- E. On time, secured by stocks and bonds.
- F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.
- G. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

- Reserve Act, as amended:**
1. On farm land.
2. On other real estate.
- H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:
1. For debts previously contracted (Section 212, F. R. S. & U.S.).
- A. Farm Land. B. Other real estate.
2. All other real estate loans—
- A. Farm Land. B. Other real estate.
- I. Acceptance of other banks discounted.
- J. Acceptance of this bank purchased or discounted.
- K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

# THE NATIONAL BANK OF TACOMA

SHEET NO. 64

NAME

*American Road Pipe Co*

ADDRESS

*Issigum*

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
71918	10/6/28	Nate Bank & Pipe Co	LCL	D	D	237	7	X	435	11-13-28	15707372		10-17-28		
71968	10/7/28	Ed B. Gosselin Co		D	D	87	7	X	160	11-14-28	15713872		10-19-28		
9	10/7/28	Am. Dist. Steam Co	LCL	D	D	50	7	X	145	10-30-28	15710872		10-19-28		
72006	10/8/28	Cons. Pipe Mfg Co	75-338	D	D	237	7	X	1770	12-26-28	15074872		10-30-28		
69432	8/1/28	J. E. Schloeder	Druck	D	D	89	7	X	130	11-8-28	15711372		10-30-28		
72046	10/8/28	Cons. Pipe Mfg Co	706578	D	D		7	X	1572	12-26-28	15748372		10-31-28		
72079	10/10/28	Pac. Nat. Water & Ice Co	Druck	D	D	190	7	X	390	11-14-28	15748372		10-31-28		
80	10/10/28	N. G. & Browning Lbrs		D	D	85	7	X	172	11-15-28	15749072		11-1-28		
1	10/10/28	Kings Hill Dr. & Ice	101546	D	D	1007	7	X	2160	11-15-28	1575072		11-1-28		
72141	10/22/28	"	108104	D	D	1081	7	X	1090	12-12-28	157506872		11-2-28		
2	10/22/28	Sum. Dr. & Ice	108104	D	D	428	7	X	450	12-15-28	1575072		11-2-28		
3	10/22/28	Kings Hill Dr. & Ice	Druck	D	D	29	7	X	225	11-9-28	1575072		11-3-28		
4	10/22/28	City of Harrison	LCL	D	D	198	7	X	320	11-23-28	1575072		11-5-28		
72146	10/22/28	Druck. & Ice. & Fuel. Co.	"	D	D	40	7	X	244	10-29-28	1575072		11-7-28		
72172	10/23/28	Am. Dist. Steam Co	160191	D	D		7	X	1180	5-14-29	1575072		11-7-28		
7217	10/23/28	D. P. Slater	Druck	D	D	51	7	X	170	11-7-28	1575072		11-8-28		
8	10/23/28	Porter & Gosselin Co	LCL	D	D	57	7	X	210	11-1-28	1575072		11-9-28		
9	10/23/28	N. G. & Browning Lbrs	80	D	D	1184	7	X	1020	12-21-28	1575072		11-9-28		
72273	10/23/28	L. & P. & D. & M. Co	Druck	D	D	409	7	X	840	11-19-28	1575072		11-10-28		
4	10/23/28	Twins Harbor Lbrs	28286	D	D	152	7	X	600	11-7-28	1575072		11-10-28		
72348	10/26/28	Town of Enumawau	Druck	D	D	203	7	X	290	12-1-28	1575072		11-13-28		
9	10/26/28	St. Louis Lbr. & Bridge Co	59631	D	D	327	7	X	700	11-19-28	1575072		11-13-28		
72393	10/29/28	C. N. Ry Co	27176	D	D	101	7	X	440	11-13-28	1575072		11-14-28		
4	10/29/28	D. P. Slater	Druck	D	D	310	7	X	340	12-10-28	1575072		11-14-28		
7056	9/15/28	Grille & Water & Ice Co	"	D	D	1000	7	X	6000	11-16-28	1575072		11-14-28		
7246	10/30/28	Ed B. Gosselin Co	50867	D	D	487	7	X	1665	11-15-28	1575072		11-16-28		
68213	7/7/28	Buchanan Lbrs	45536	D	D		7	X	184	11-21-28	1575072		11-16-28		
72483	10/31/28	Nate Bank & Pipe Co	LCL	D	D	40	7	X	152	11-10-28	1575072		11-16-28		
4	10/31/28	St. Matthew Kingan Co	8054	D	D	215	7	X	452	11-20-28	1575072		11-17-28		



65 SHEET NO.

## THE NATIONAL BANK OF TACOMA

- CLASSIFICATION
- A. On Demand, paper with one or more individual or firm names (not secured by collateral).
- B. On Demand, secured by stock and bonds.
- C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
- D. On time, paper with one or more individual or firm names (not secured by collateral).
- E. On time, secured by stocks and bonds.
- F. On time secured by other personal securities, including merchandise, warehouse receipts, etc.
- G. Secured by improved real estate under authority of Section 34, Federal

- Reserve Act, as amended:
1. On farm land. 2. On other real estate.
- H. Secured by real estate mortgages or other liens on realty not in accordance with Section 34, Federal Reserve Act as amended:
1. For debts previously contracted (Section 513, R.R.U.R.)—
- A. Farm lands. B. Other real estate.
2. All other real estate loans—
- A. Farm lands. B. Other real estate.
- I. Acceptances of other banks discounted.
- J. Acceptances of this bank purchased or discounted.
- K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

NAME

ADDRESS

*American Wood Exports*  
*Assignments*

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
7245	10/31/28	J. A. Moore	Druck	D	D	50	7	X	170	11-15-28					
6	10/31/28	Village of Carlos Fork	L. H.	D	D	50	7	X	150	11-10-28					
7252	11/1/28	Am. Paper Station	W. H. B.	D	D		7	X	132	9-9-29					
7259	11/1/28	Union Bay Paper Co		D	D	132	7	X	853	11-10-28					
1	11/1/28	Browning Arms		D	D	228	7	X	555	12-21-28					
7262	11/1/28	W. H. B.	20375	D	D	106	7	X	385	11-17-28					
7265	11/5/28	Her. Com. Paper Co	27202	D	D		7	X	1620	11-19-28					
4	11/5/28	Charles H. B. Co	931656	D	D	1234	7	X	1770	12-11-28					
6854	7/7/28	Com. Paper Co	12827	D	D	18437	7	X	1000	11-19-28					
70073	8/28/28	St. Michael's Mission	31357	D	D		7	X	965	11-13-28					
2163	10/8/28	W. H. B. of Belamont	47471	D	D	14427	7	X	3062	12-3-28					
7275	11/7/28	City of Tacoma	Druck	D	D	1727	7	X	260	12-11-28					
8	11/7/28	Com. Paper Co	8246	D	D		7	X	1190	12-3-28					
9	11/7/28	Ch. B. Bank		D	D	897	7	X	325	11-21-28					
7276	11/7/28	Com. Paper Co	Druck	D	D	497	7	X	455	11-17-28					
70828	9/17/28	Her. Com. Paper Co		D	D	3632	7	X	1160	12-31-28					
7280	11/8/28	W. H. B. of Belamont		D	D		7	X	680	12-21-28					
1	11/8/28	Com. Paper Co	Druck	D	D	2390	7	X	1000	3-8-29					
72845	11/9/28	Ch. B. Bank	L. H.	D	D	707	7	X	300	11-21-28					
6	11/9/28	W. H. B. of Belamont	47471	D	D	1617	7	X	340	12-3-28					
7	11/9/28	Union Bay Paper Co	24450	D	D	257	7	X	1000	11-22-28					
72877	11/10/28	Com. Paper Co	63361	D	D		7	X	1425	9-2-29					
70073	8/25/28	St. Michael's Mission	31357	D	D		7	X	690	11-21-28					
68493	7/4/28	Com. Paper Co	16484	D	D		7	X	407	12-7-28					
68563	6/6/28	James Wayne	20325	D	D	8680	7	X	14565	2-21-29					
72945	11/13/28	Com. Paper Co	60003	D	D		7	X	2325	3-6-29					
73009	11/14/28	"	66380	D	D		7	X	1800						
73009	11/15/28	Harry Yard		D	D	1360	7	X	1142	11-14-29					
7	11/15/28	Com. Paper Co	51767	D	D	1507	7	X	1700	12-31-28					





**CLASSIFICATION**  
 A. On demand, paper with one or more individual or firm names (not secured by collateral).  
 B. On demand, secured by stock and bonds.  
 C. On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D. On time, paper with one or more individual or firm names (not secured by collateral).  
 E. On time, secured by stocks and bonds.  
 F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G. Secured by improved real estate under authority of Section 24, Federal

Reserve Act, as amended:  
 1. On farm land.  
 2. On other real estate.  
 H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 517, R. S. U.S.).  
 A. Farm Lands. B. Other real estate.  
 2. All other real estate loans—  
 A. Farm Lands. B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

# THE NATIONAL BANK OF TACOMA

SHEET NO. 66

NAME

*American Wood Products  
Assignments*

ADDRESS

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
7161	10828	Am Ldy Mach Co	15392	P	P	1353	7	L	300	11-27-28	12619716		11-17-28		
7316	111628	Winatche Vinegar Co	Druck	P	P	1041	7	L	590	2-13-29	11353353		11-19-28		
7	111628	Sullivan Win Co	LH	P	P	727	7	L	305	11-28-28	11599900		11-19-28		
6716	61328	JOSEY Bague	30988	P	P		7	L	278038	12-12-28	11534443		11-20-28		
7316	111728	JOSEY Bague	61661	P	P	195	7	L	720	12-1-28	11554950		11-20-28		
7243	111728	Wincham Loppus Co	7102	P	P	648	7	L	46526	12-12-28	11690400		11-21-28		
6813	77028	Cont Diplo Co	47340	P	P	3641	7	L	19710	11-28-28	11537947		11-21-28		
7316	111928	Sagman Loppus Co	LH	P	P	707	7	L	130	12-17-28	11646400		11-21-28		
7	111928	Wincham Loppus Co	110351	P	P		7	L	1400	12-26-28	11643443		11-21-28		
8	111928	JOSEY Bague	Druck	P	P	91	7	L	390	12-1-28	12114400		11-23-28		
7109	111928	Am Ldy Mach Co		P	P	648	7	L	2240	12-4-28	11650440		11-23-28		
7316	112028	Sagman Loppus Co	"	P	P	461	7	L	885	12-17-28	11634940		11-24-28		
6	112028	Winatche Vinegar Co	8058	P	P	2017	7	L	1220	2-13-29	11787440		11-26-28		
7	112028	Am Ldy Mach Co	128868	P	P	3594	7	L	2680	1-28-29	11657440		11-27-28		
6813	7728	Buchanan Loppus Co	44436	P	P		7	L	1625	11-21-28	11619440		11-28-28		
6813	7728	"	"	P	P		7	L	1125	11-26-28	11600440		11-30-28		
7007	82828	Michael Mission	31357	P	P	2984	7	L	364	12-5-28	11620440		11-30-28		
7317	113028	JOSEY Bague	Druck	P	P		7	L	685	4-5-29	11623440		11-30-28		
7317	113028	JOSEY Bague	LH	P	P	1127	7	L	785	12-4-28	11622440		12-1-28		
7317	113028	JOSEY Bague	Druck	P	P	727	7	L	255	12-1-28	11633440		12-1-28		
7317	113028	JOSEY Bague	LH	P	P	880	7	L	340	4-5-29	11633440		12-3-28		
7317	113028	JOSEY Bague	159037	P	P	2167	7	L	845	12-7-28	11656440		12-3-28		
6813	7728	Buchanan Loppus Co	44436	P	P		7	L	625	11-30-28	11646440		12-4-28		
7316	112628	Wincham Loppus Co		P	P	2727	7	L	7715	12-14-28	11679440		12-4-28		
7147	10428	JOSEY Bague		P	P		7	L	1525	12-26-28	11676440		12-5-28		
6813	7728	Buchanan Loppus Co	44436	P	P	2727	7	L	325	12-1-28	11633440		12-6-28		
6917	82328	JOSEY Bague		P	P	2017	7	L	440	12-17-28	11632440		12-7-28		
7149	10328	JOSEY Bague	131694	P	P		7	L	1200	12-10-28	11620440		12-7-28		
7366	113028	JOSEY Bague		P	P		7	L	2200	12-10-28	11630740		12-10-28		



## THE NATIONAL BANK OF TACOMA

NAME

American Wood Pipe & Sash Co.  
Assignments

ADDRESS

## CLASSIFICATION

- A. On demand, paper with one or more individual or firm names (not secured by collateral).  
 B. On demand, secured by stock and bonds.  
 C. On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D. On time, paper with one or more individual or firm names (not secured by collateral).  
 E. On time, secured by stock and bonds.  
 F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G. Secured by improved real estate under authority of Section 24, Federal Reserve Act.

- H. Secured by real estate (including other forms of title) as provided in Section 24, Federal Reserve Act.  
 I. For debts previously contracted (Section 24, F.R.A.).  
 J. For other real estate loans—  
 A. Farm loans.  
 B. Other real estate.  
 K. Acceptances of other banks discounted.  
 L. Acceptances of this bank purchased or discounted.  
 M. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Disc	PAYER	Amount	Disc
73499	11/28/28	Twinn & Harbo Lbls	42179	D	D	46	7	1	1030	1-15-29	13253952		12-10-28		
73747	12/3/28	Am Bios Steam Co	6375	D	D				1920	6-19-29	12775992		12-11-28		
73758	11/7/28	New Cons Copper Co	8266	D	D				7497	1-1-29	128253092		12-11-28		
73813	12/3/28	T. B. Gossett Co		D	D				3230	6-14-29	12700092		12-11-28		
73875	12/4/28	Am Ldy Mch Co	2711009	D	D				2300	1-16-29	12856492		12-11-28		
6	12/4/28	Twinn & Harbo Lbls	40202	D	D				1085	12-11-28	12856492		12-11-28		
73916	12/5/28	Am Ldy Mch Co		D	D				3700		12690027		12-12-28		
73964	12/6/28	Twinn & Harbo Lbls		D	D				2300	12-16-28	12690027		12-12-28		
68433	7/12/28	Crown of Fruit	16596	D	D	31			8435	1-1-29	13339827		12-12-28		
73980	12/7/28	Western Mch Co		D	D	385			260	2-1-29	13648527		12-12-28		
69061	8/1/28	Cont Dip Mch Co	170088	D	D	566			527	12-9-28	13667027		12-14-28		
70160	11/30/28	Twinn & Harbo Lbls		D	D	886			1280	12-29-28	13635527		12-15-28		
74089	12/8/28	"	99633	D	D	168			960	12-1-29	13596827		12-17-28		
74049	12/10/28	"		D	D				1600	12-1-29	13586830		12-18-28		
74040	12/10/28	N & C Browning Lbls		D	D	406			180		13919030		12-18-28		
73896	12/4/28	Twinn & Harbo Lbls	40202	D	D	153			9997	12-18-28	13790992		12-19-28		
70995	9/21/28	N & C Browning Lbls		D	D	1194			26858	1-15-29	14144992		12-20-28		
74100	12/11/28	Pacific Lumber Co	Druck	D	D	157			475	12-28-28	13802104		12-21-28		
74148	12/11/28	N & C Browning Lbls		D	D	1105			530	4-1-29	13806332		12-21-28		
9	12/11/28	Eatonville Lbls	308642	D	D	38			100	12-28-28	13785332		12-22-28		
67162	6/13/28	East Coyne	30988	D	D	11644			271093	2-21-29	13982332		12-22-28		
74187	12/12/28	W. S. D. and W. Service		D	D				6800	3-11-29	14002332		12-24-28		
74167	12/14/28	Twinn & Harbo Lbls		D	D				3100		12859067		12-26-28		
8	12/14/28	New Cons Copper Co	62318	D	D				2115	12-26-28	12646367		12-26-28		
9	12/14/28	"	43491	D	D				1030	12-26-28	12843367		12-27-28		
74170	12/14/28	"	57539	D	D				1890	12-26-28	12698867		12-28-28		
11	12/14/28	"	17344	D	D				270	12-26-28					
74175	12/14/28	Ed duPont de Nemours Co	Druck	D	D	80			185	1-5-29	12847367		12-28-28		
74194	12/15/28	Am Bios Steam Co	"	D	D	277			475	1-14-29	12953367		12-29-28		





**CLASSIFICATION**

A. On demand, paper with one or more individual or firm names (not secured by collateral)

B. On demand, secured by stock and bonds

C. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.

D. On time, paper with one or more individual or firm names (not secured by collateral)

E. On time, secured by stocks and bonds

F. On time, secured by other personal securities, including merchandise, warehouse receipts etc.

G. Secured by improved real estate under authority of Section 24, Federal

Reserve Act, as amended:

1. On farm land

2. On other real estate

H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act as amended.

1. For debts previously contracted (Section 5127, R. S. U.S.)—

A. Farm lands

B. Other real estate

2. All other real estate loans—

A. Farm lands

B. Other real estate

I. Acceptances of other banks discounted.

J. Acceptances of this bank purchased or discounted.

K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

# THE NATIONAL BANK OF TACOMA

SHEET NO. 68

NAME

*American Wood Works*

ADDRESS

*Assignment*

Number	Date of Item	MAKER	ENDORSEES	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTRED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
7437	2-17-28	Row of Goldendale		D	D	2018	7	L	2035	2-6-29	1305367		12-29-28		
7404	12-10-28	Twinn Harbor Lb Co		D	D	702	7	L	1020	1-10-29	12712367		12-31-28		
7432	12-8-28	"	112810	D	D	70	7	L	180	12-22-28	12831867		12-31-28		
7418	12-8-28	"		D	D		7	L	3320		13108867		1-2-29		
70105	8-19-28	Cap Pipe Works	81793	D	D	2314	7	L	12334	12-26-28	1333267		1-3-29		
7464	12-19-28	Taylor Bridge		D	D	265	7	L	235	2-12-29	13112867		1-2-29		
7472	12-20-28	Twinn Harbor Lb Co		D	D		7	L	3450	1-3-29	12978867		1-5-29		
7483	11-8-28	N.A. Browning		D	D	715	7	L	56310	1-15-29	13209867		1-5-29		
7461	12-22-28			D	D	4200	7	L	2090	1-5-29	13396867		1-7-29		
	2-22-28	Our Bank De Nemours	Druck	D	D	131	7	L	242	1-18-29	13605067		1-8-29		
7473	12-22-28	Cap Pipe Works		D	D	320	7	L	220	3-9-29	13615367		1-8-29		
7406	10-18-28	"	706738	D	D	265	7	L	126645	1-14-29	13592867		1-9-29		
73167	11-19-28	Thule Lb Co Dodge Supply Co	40341	D	D	1249	7	L	29145	1-16-29	13777867		1-4-29		
7147	10-18-28	Stah Lake Dist Co		D	D	3828	7	L	225	1-29-29	13942867		1-10-29		
73875	12-4-28	Am. Lb. Works Co	271109	D	D	1012	7	L	20	1-2-29	1391367		1-11-29		
7468	12-14-28	Am. Lb. Works Co	62318	D	D	549	7	L	20541	1-9-29	13905716		1-12-29		
7470	12-14-28	"	17566	D	D	334	7	L	2990	1-1-29	1393716		1-12-29		
	12-14-28	"	17345	D	D	164	7	L	18225	1-11-29	13971071		1-10-29		
7429	12-14-28	"	43041	D	D	201	7	L	35384	1-6-29	1589999		1-15-29		
73962	12-6-28	Twinn Harbor Lb Co		D	D	965	7	L	1275	12-28-28	1595261		1-16-29		
74707	12-26-28	"	579175	D	D	190	7	L	1075	1-2-29	1566661		1-17-29		
	8-12-28	N.A. Browning		D	D		7	L	1390	1-19-29	1583261		1-17-29		
7474	12-27-28	Twinn Harbor Lb Co	592028	D	D	2207	7	L	1320	1-17-29	1581961		1-18-29		
	8-27-28	Henry & Davis Co		D	D	152	7	L	885	1-5-29	15760961		1-19-29		
74788	12-28-28	Twinn Harbor Lb Co		D	D		7	L	1660	1-21-29	16098461		1-21-29		
	9-12-28	"		D	D	150	7	L	1100	1-2-29	1596661		1-22-29		
74820	12-19-28	Monte & Hart		D	D	2206	7	L	3300	2-2-29	16113661		1-22-29		
7419	10-3-28	Em L. Harris	132490	D	D	4610	7	L	700	2-28-29	1626461		1-23-29		
74823	12-31-28	Twinn Harbor Lb Co	159645	D	D	113	7	L	1175	1-5-29	16213661		1-24-29		



✓ 69 SHEET NO.

# THE NATIONAL BANK OF TACOMA

NAME

*American Wood Pipe Co*

ADDRESS

*Issigummo*

- CLASSIFICATION**
- On demand, paper with one or more individual or firm names (not secured by collateral).
  - On demand, secured by stock and bonds.
  - On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
  - On time, paper with one or more individual or firm names (not secured by collateral).
  - On time, secured by stocks and bonds.
  - On time, secured by other personal securities, including merchandise, warehouse receipts, etc.
  - Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

- Reserve Act, as amended:**
- On farm land.
  - On other real estate.
  - Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended.
  - For debts previously contracted.
  - For other real estate.
  - Acceptances of other banks discounted.
  - Acceptances of this bank purchased or discounted.
  - Customers' liability on accounts of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Dues	PAYER	Amount	Date of Payment
74947	12-29-19	Twin Harbors Lbr Co		D	D		7	L	3270		16480961		1-26-19		
74981	13-19-19	"		D	D		7	L	2235	7-29-31	1664961		1-26-19		
75061	15-19-19	Kenney & Davis L Co	6943	D	D	660	7	L	925	2-11-19	1639961		1-28-19		
2	15-19-19	Oregon Casket Co	62518	D	D	68	7	L	270	1-18-19	16508961		1-28-19		
3	15-19-19	Twin Harbors Lbr Co		D	D		7	L	2000		1665961		1-29-19		
75107	17-19-19	Frank Porter Lbr Co		D	D		7	L	1870		1663961		1-30-19		
75146	18-19-19	Danield & Co Paper Co	Truck	D	D	70	7	L	175	1-29-19	16803961		2-1-19		
2	18-19-19	St. Helens Lbr & Ship Co		D	D		7	L	2010	1-31-19	1657961		2-2-19		
75187	19-19-19	Dra & Harding		D	D		7	L	1830		1646661		2-4-19		
75200	110-19-19	Twin Harbors Lbr Co	16252	D	D	50	7	L	182	1-15-19	16848961		2-5-19		
5	110-19-19	"		D	D		7	L	2135		17151061		2-5-19		
75256	111-19-19	Mr. deane Lbr & Ship Co	Truck	D	D	25	7	L	325	1-25-19	16693961		2-6-19		
75305	112-19-19	Keyserhouse Lbr Co		D	D	22	7	L	185	1-23-19	17060661		2-6-19		
75340	114-19-19	Nate Sugar Mfg Co		D	D		7	L	17100	7-19-19	1723461		2-8-19		
75395	115-19-19	St. Helens Lbr & Ship Co		D	D		7	L	1820		17528461		2-8-19		
6	115-19-19	Twin Harbors Lbr Co		D	D		7	L	3525		17808461		2-9-19		
75470	117-19-19	Am. Can & Soda Co	592085	D	D	132	7	L	1362	1-22-19	1774961		2-11-19		
1	117-19-19	Twin Harbors Lbr Co		D	D		7	L	1352		1795961		2-11-19		
75523	119-19-19	Town of Oting		D	D		7	L	2790	5-10-19	1789961		2-13-19		
75788	1208-19-19	Twin Harbors Lbr Co		D	D	1062	7	L	820	2-8-19	17990961		2-13-19		
75833	121-19-19	"		D	D		7	L	3375		18307461		2-15-19		
5	121-19-19	"		D	D	125	7	L	840	1-28-19	18547582		2-16-19		
75617	122-19-19	St. Helens Lbr & Ship Co		D	D		7	L	1290	1-30-19	18561082		2-18-19		
18	122-19-19	City of Bremerton		D	D	50	7	L	220	1-30-19	18561082		2-19-19		
75668	123-19-19	Palmer & Smith Lbr Co		D	D		7	L	2215	3-26-19	18561082		2-19-19		
75698	124-19-19	St. Helens Lbr & Ship Co		D	D		7	L	1970		1902461		2-20-19		
75788	126-19-19	70 Indian Reservation		D	D		7	L	1690	4-1-19	1686116		2-21-19		
75824	128-19-19	E. B. Benson		D	D		7	L	1025	2-20-19	1672116		2-21-19		
3	128-19-19	Palmer & Smith Lbr Co		D	D		7	L	1085	2-22-19	1684616		2-23-19		





## CLASSIFICATION

- A On demand notes with one or more individual or firm names (not secured by collateral)  
 B On demand secured by stocks and bonds  
 C On demand secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D On time paper with one or more individual or firm names (not secured by collateral)  
 E On time secured by stocks and bonds  
 F On time secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G Secured by improved real estate under authority of Section 24, Federal

Reserve Act, as amended.

- H Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended.  
 I Acceptances of other banks discounted  
 J Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed

## THE NATIONAL BANK OF TACOMA

SHEET NO 70

NAME

ADDRESS

*American Road & Lumber Co*  
*Issuing Office*

Number	Date of Item	MAKER	ENDORSEES	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	NAME	AMOUNT	DATE
7530	24 14	Crown of Toledo		D	D		7	L	2160	3-2-19	1944616				2-25-19
7547	18 14	Whitely Budget Lumber Co		D	D		7	L	1610	3-20-19	1447116				2-25-19
7595	13 14	"	69979	D	D	370	7	L	400	3-20-19	14762116				2-27-19
7612	12 10 18	Twinn Karbon Lbrs		D	D		7	L	2615	4-10-19	15016116				2-28-19
7642	13 14	"	40999	D	D	95	7	L	915	2-5-19	15217116				3-2-19
7661	21 14	Whitely Budget Lumber Co		D	D		7	L	1710		1521116				3-4-19
7679	22 14	Oregon Casket Co		D	D		7	L	1000	2-16-19	1532116				3-5-19
7688	26 14	Ralph L Smith Lbrs		D	D		7	L	3200		15521616				3-5-19
7694	24 14	Pamlin Pulp & Paper Co		D	D	125	7	L	435	2-19-19	1543917				3-6-19
7696	20 14	Twinn Karbon Lbrs		D	D		7	L	2925		1554417				3-6-19
7617	24 14	"		D	D		7	L	1475	4-5-19	15521417				3-7-19
7618	27 14	"		D	D		7	L	2400		15677417				3-7-19
7620	28 14	Ralph L Smith Lbrs		D	D		7	L	3022		15633417				3-8-19
7622	29 14	Whitely Budget Lumber Co		D	D		7	L	2800	4-17-19	15611417				3-9-19
7630	21 14	Twinn Karbon Lbrs		D	D		7	L	2000	3-21-19	1578917				3-9-19
7632	23 14	"		D	D		7	L	2420		1572917				3-11-19
7637	21 5 14	Pamlin Pulp & Paper Co		D	D		7	L	3600	5-7-19	15382917				3-11-19
7649	22 14	Oregon Casket Co		D	D	425	7	L	4012	3-14-19	15418417				3-12-19
7650	21 8 14	Whitely Budget Lumber Co		D	D		7	L	1515		1551417				3-13-19
7651	21 8 14	Twinn Karbon Lbrs		D	D		7	L	1600		15475296				3-14-19
7657	21 9 14	Twinn Karbon Lbrs		D	D		7	L	3025	3-11-19	1539296				3-14-19
7682	1 28 14	E. J. Benson		D	D	146	7	L	8845	4-19-19	15384296				3-15-19
7668	3 20 14	Whitely Budget Lumber Co		D	D		7	L	2125		15475296				3-15-19
7668	22 14	Twinn Karbon Lbrs		D	D	775	7	L	1530	3-19-19	15606296				3-16-19
7668	22 3 14	"		D	D		7	L	1335		15413296				3-18-19
7676	22 0 14	Pamlin Pulp & Paper Co		D	D		7	L	3850		15080296				3-19-19
7684	22 7 14	Ralph L Smith Lbrs		D	D		7	L	2050		15305296				3-19-19
7690	22 8 14	Pamlin Pulp & Paper Co		D	D		7	L	3200		1528296				3-20-19
7693	1 29 14	Crown of Toledo		D	D	2546	7	L	1925	4-3-19	15366796				3-20-19



71 SHEET NO.

## THE NATIONAL BANK OF TACOMA

NAME

ADDRESS

*American Road & Pipe Co.*  
*Assignments*

## CLASSIFICATION

- A. On demand paper with one or more individual or firm names (not secured by collateral)  
 B. On demand, secured by stock and bonds  
 C. On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D. On time paper with one or more individual or firm names (not secured by collateral)  
 E. On time, secured by stocks and bonds  
 F. On time secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G. Secured by improved real estate under authority of Section 24 Federal Reserve Act as amended.

Reserve Act as amended.

1. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended.  
 2. For debts previously contracted (Section 213, R. S. U. S.).  
 A. Farm lands  
 B. Other real estate  
 3. All other real estate loans—  
 A. Farm lands  
 B. Other real estate  
 4. Acceptances of other banks discounted  
 5. Acceptances of this bank, purchased or discounted  
 6. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date & Item	MAKER	ENDORSEES	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED			
											Amount	Date	PAID	Amount	Date	PAID
76981	3-2-29	Modum El. Water Co	63689	D	D	34	7	X	1533	3-15-29	15340296		3-21-29			
2	3-2-29	Consumers Co		D	D	69	7	X	153	3-21-29	15346296		3-21-29			
3	3-2-29	Blumling Gas Water		D	D	506	7	X	230	4-23-29	1544796		3-26-29			
7703	3-4-29	St Paul Tacoma Lb Co	Cruck	D	D	50	7	X	340	3-7-29	15105796		3-28-29			
7704	3-5-29	Croville Donohoe Dr	LX	D	D	417	7	X	630	4-8-29	15003795		3-30-29			
5	3-5-29	Tacoma Land & Imp Co	Cruck	D	D	50	7	X	100	3-28-29	14816694		4-1-29			
7709	3-5-29	P. C. Blackwell Co	LX	D	D	453	7	X	205	4-12-29	14800375		4-1-29			
2	3-5-29	Edual Mining Co	118953	D	D	450	7	X	1800	3-19-29	14785875		4-2-29			
7714	11-3-29	Smuggler Mining Co	60003	D	D	7	7	X	121801	4-4-29	14627875		4-3-29			
7717	3-6-29	Lord & Bushnell Co	596370	D	D	7	7	X	14105	3-30-29	14527875		4-4-29			
7717	3-7-29	Wants Tacoma Dr	122202	D	D	1183	7	X	1560	4-14-29	14763795		4-4-29			
7714	3-8-29	O. Slater		D	D	117	7	X	300	3-28-29	14660795		4-5-29			
7720	3-8-29	Pacific Pipe & Paper Co		D	D	91	7	X	285	3-25-29	14138813		4-5-29			
7727	3-9-29	Little River Petroleum Co	64372	D	D	942	7	X	1290	4-16-29	14401813		4-5-29			
7418	1-12-28	Indian Warehouse		D	D	7	7	X	270	3-18-29	14300813		4-6-29			
7657	2-14-29	Spauldine Lb Co		D	D	7	7	X	1070	4-10-29	14237813		4-8-29			
7734	3-1-29	Little River Petroleum Co	69473	D	D	7	7	X	915		1402813		4-8-29			
3	3-11-29	Summit Point Docking Co		D	D	342	7	X	635	4-12-29	14000813		4-9-29			
7734	3-1-29	Dept of Interior	LX	D	D	104	7	X	355	3-26-29	14000813		4-9-29			
7743	3-3-29	St. Matthew Light & Dr	42701	D	D	512	7	X	770	4-15-29	1436013		4-10-29			
7746	3-5-29	Chute & Sons Lumber		D	D	7	7	X	600	5-27-29	1439013		4-11-29			
7751	3-10-29	Lord & Bushnell Co		D	D	560	7	X	1310	4-6-29	1419013		4-12-29			
7753	3-16-29	Olympia Golf Country Club	Cruck	D	D	427	7	X	910	4-12-29	1422900		4-12-29			
7418	1-12-28	Indian Warehouse		D	D	12368	7	X	870	4-11-29	1419013		4-13-29			
7766	3-9-29	Lechwood Canada, Ind. Dr	65034	D	D	7	7	X	915	3-31-30	1419013		4-13-29			
70	3-9-29	L. Bourke	42444	D	D	107	7	X	260	4-9-29	1438013		4-13-29			
1	3-9-29	Mutual Dr	42413	D	D	247	7	X	450	4-17-29	1439013		4-15-29			
2	3-9-29	Condo Water & Land Co	42413	D	D	7	7	X	615	4-17-29	1439013		4-15-29			
7814	8-1-29	St. Hubert Lb & Hdg Co		D	D	7	7	X	1240		13836813		4-16-29			





# CLASSIFICATION

- A. On Demand, paper with one or more individual or firm names (not secured by collateral).
- B. On Demand, secured by stock and bonds.
- C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
- D. On Demand, paper with one or more individual or firm names (not secured by collateral).
- E. On Demand, secured by stocks and bonds.
- F. On Demand, secured by other personal securities, including merchandise.
- G. On Demand, secured by warehouse receipts, etc.
- H. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

- I. Acceptances of other banks purchased or discounted.
- J. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.
- K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.
- L. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- M. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- N. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- O. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- P. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- Q. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- R. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- S. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- T. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- U. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- V. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- W. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- X. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- Y. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.
- Z. On Demand, secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

## THE NATIONAL BANK OF TACOMA

SHEET NO. 72

NAME

*Amiea Ward Spiles*

ADDRESS

*Assignment*

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED			
											Amount	Date	PAYER	Amount	Date	Debit
7710	3/20/29	Duncan & Harrison		D	D	808	7	L	135	4/19/29	13909813					
7630	2/11/29	Quinn & Harlow Lbr Co		D	D		7	L	1235		13807513					
75668	1/23/29	Ray L. Smith Lbr Co		D	D		7	L	1565	4-1-29	13800313					
77128	3/6/29	Lois & Bushnell Co		D	D	89	7	L	44079	4-16-29	13883813					
75788	1/26/29	W.D. Indian Drk Co		D	D	2136	7	L	59317	4-1-29	13606313					
78088	3/23/29	Nov De Ry Co		D	D		7	L	65	4-1-29	13517815					
9	3/29/29	Contrafarms Water Co		D	D		7	L	37	7-17-29	1397818					
75668	1/23/29	Ray L. Smith Lbr Co		D	D		7	L	1410		1300518					
76195	4/2/29	City of Centralia	Truck	D	D		7	L	355	4-13-29	13037818					
77945	1/13/28	Smuggler Mining Co		D	D		7	L	21801	4-29-29	12940818					
76241	4/4/29	Dephy Interier		D	D		7	L	570	4-21-29	12846739					
2	4/4/29	Trachy & Skinner		D	D		7	L	1545	4-13-29	12794239					
3	4/4/29	Quinto Logging Co		D	D	50	7	L	240	4-1-29	12689739					
76127	2/6/29	Quinn & Harlow Lbr Co		D	D		7	L	290		1259339					
77317	1/21/29	K. Q. Browning Lbr Co		D	D		7	L	44438	4-15-29	12493339					
78090	4/5/29	F. Qualring Moore	99762	D	D	780	7	L	1540	5-1-29	1245239					
1	4/5/29	Henry Lbr Co	37890	D	D	379	7	L	1390	4-19-29	12392588					
77378	4/8/29	Malins Lbr Co	42762	D	D	498	7	L	1600	4-20-29	12082147					
9	4/6/29	Western Public Service Co	LQ	D	D	90	7	L	290	4-22-29	12070347					
78222	4/9/29	White Dry Co		D	D	206	7	L	275	5-27-29	12031147					
3	4/9/29	Down of Stevedore	Truck	D	D	137	7	L	244	5-8-29	11949747					
78253	4/9/29	Ray L. Smith Lbr Co		D	D		7	L	1245	2-13-30	11756947					
76571	2/19/29	Quinn & Harlow Lbr Co		D	D		7	L	745		11678547					
70412	12/20/29	"		D	D		7	L	1715	7-29-30	11576649					
78493	4/11/29	Pacoma Land & Drp Co	Truck	D	D	70	7	L	120	5-15-29	11502717					
4	4/11/29	Patterson Lbr Co	LQ	D	D	50	7	L	130	4-22-29	11470947					
78530	4/12/29	Intermountain Water Co		D	D	40	7	L	250	4-22-29	1087540					
31	4/11/29	Bank of Puget City		D	D	40	7	L	90	4-22-29	10870640					
78024	4/13/29	City of Everett	7149	D	D	1691	7	L	1890	5-29-29	1080570					



# THE NATIONAL BANK OF TACOMA

3 SHEET NO.

*American Standard Life Co*  
*Assignments*

- CLASSIFICATION**
- A. On demand, payable with one or more individual or firm names (not secured by collateral).
  - B. On demand, secured by stock and bonds.
  - C. On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
  - D. On time, payable with one or more individual or firm names (not secured by collateral).
  - E. On time, secured by stock and bonds.
  - F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.
  - G. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

- Reserve Act, as amended:**
- 1. On farm land.
  - 2. On other real estate.
  - Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended.
  - 1. For debts previously contracted (Section 512, R.S.U.S.).
  - 2. All other real estate loans—
  - A. Farm lands.
  - B. Other real estate.
  - I. Acceptances of other banks discounted.
  - J. Acceptances of this bank purchased or discounted.
  - K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Interest
7331	11-21-18	At Browning Lbs		P	P				1464386-19-29	10-19-28			7-15-29		
7332	4-15-29	J M Johnston	38658	P	P	64	7		440	4-23-29	10253606		7-24-29		
7333	4-16-29	Am Bonded Pk Co	Druck	P	P	152	7		715	4-27-29	10799078		7-27-29		
7334	2-17-29	Thule Lbr Bldg Sup Co		P	P	2185	4		2185	4-30-29	0178975		7-27-29		
7335	4-17-29	Tacoma County Pk Co		P	P	320	7		320	7-17-29	9646293		8-17-29		
7336	6-21-29	Country Home Bldg Co	L.C.L.	P	P	95	7		95	6-21-29	9646293		8-19-29		
7337	4-17-29	Gailbays Bros	"	P	P	130	7		75	7-16-29	9606293		9-3-29		
7338	4-17-29	Boise Payroll Lbs	"	P	P	62	7		320	4-27-29	9646293		9-9-29		
7339	1-18-29	Delphi Lbr Bldg Co		P	P	185	7		185		509005		10-7-29		
7340	4-22-29	Thule Lbr Bldg Co		P	P	830	5		830	5-8-29	9076323		10-28-29		
7341	2-9-29	"		P	P	1620	7		1620		9076323		12-13-29		
7342	2-15-29	Paimin Lbr Bldg Co		P	P	317	7		317		9076323		2-10-30		
7343	1-22-29	Thule Lbr Bldg Co		P	P	205	7		205		8948846		2-19-30		
7344	1-19-29	Down of Oting		P	P	88049	6		88049	6-10-29	8856346		3-21-30		
7345	10-23-28	Am Dissection Co		P	P	5892	7		10749	7-12-29	8856346		5-8-30		
7346	3-19-29	Orondo State Land Co		P	P	1002	7		22227	2-14-29	8719856		6-4-30		
7347	3-10-29	Chute Bros Saw Mills		P	P		7		6314	6-14-29	1640040		10-11-30		
7348	1-19-29	Down of Oting		P	P		7		56436	1-14-29	8509902		10-14-30		
7349	12-3-28	A.B. Boswell Co		P	P		7		163149	7-12-29	8383694		2-19-31		
7350	12-3-28	Am Dissection Co		P	P		7		60207	7-12-29	8396442		3-2-31		
7351	11-21-18	At Browning Lbs		P	P	20054	7		64387	2-27-29	8243442		7-19-31		
7352	12-16-28	"		P	P	531	7		750	7-27-29					
7353	12-3-28	Am Dissection Co		P	P		7		32113	6-4-30					
7354	12-3-28	A.B. Boswell Co		P	P		7		1006	6-4-30					
7355	4-7-29	Tacoma County Pk Co		P	P	607	7		375	2-10-30					
7356	3-29-29	Country Home Bldg Co		P	P		7		70535	5-8-30					
7357	1-14-29	Nate Sugar Mfg Co		P	P		7		1177318	8-17-29					
7358	12-16-28	At Browning Lbs		P	P		7		10807	6-4-30					
7359	1-14-29	Nate Sugar Mfg Co		P	P		7		644636	10-18-29					





**CLASSIFICATION**

- A. On demand, paper with one or more individual or firm names (not secured by collateral).  
 B. On demand, secured by stock and bonds.  
 C. On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 D. On time, paper with one or more individual or firm names (not secured by collateral).  
 E. On time, secured by stocks and bonds.  
 F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 G. Secured by improved real estate under authority of Section 24, Federal

Reserve Act, as amended:

1. On farm land.  
 2. On other real estate.  
 H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 3137, R. S. U.S.).  
 A. Farm lands.  
 B. Other real estate.  
 2. All other real estate loans—  
 A. Farm lands.  
 B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

**THE NATIONAL BANK OF TACOMA**

SHEET NO. 74

NAME

ADDRESS

*American Trust & Savings Co.*

AMERICAN NATIONAL BANK OF TACOMA, WASHINGTON, 1917

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED			
											Amount	Date	FAYER	Amount	Date of Payment	
7845	11/3/28	Smuggler Mining Co		D	D		7	1	1801							
7877	11/10/29	"	63761	D	D		7	1	1225	10-7-29						
7852	11/1/29	Consolidated Steam Co	201538	D	D		7	1	5791	6-4-30						
7877	11/10/28	Smuggler Mining Co	63761	D	D		7	1	993							
78360	11/2/29	Nat Sugar Mfg Co		D	D		7	1	211954	10-11-30						
7842	4/4/29	Mackay & Schenck	42744	D	D		7	1	1065	2-19-30						
7842	4/4/29	"	42744	D	D		7	1	27408	6-4-30						
7889	3/29/29	Country Stores Market Co	201	D	D		7	1	2054	6-4-30						
7877	12/3/28	Am Dis Steam Co		D	D		7	1	14301	2-13-31						
78360	11/2/29	Nat Sugar Mfg Co		D	D		7	1	142138	10-15-30						
7843	4/9/29	Bay View Packing Co		D	D		7	1	89591	3-2-31						
7843	4/9/29	"		D	D		7	1	80841							
7847	12/20/28	Quinn & Salmon & Co		D	D		7	1	2615							



# CLASSIFICATION

- A. On Demand, paper with one or more individual or firm names (not secured by collateral)
- B. On Demand, secured by stock and bonds
- C. On Demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
- D. On time, paper with one or more individual or firm names (not secured by collateral)
- E. On time, secured by stocks and bonds
- F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.
- G. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

Reserve Act, as amended:

- 1. On farm land.
- 2. On other real estate.

H. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended.

- 1. For debts previously contracted (Section 5107, R.S.U.S.)—

- A. Farm lands
- B. Other real estate

- 2. All other real estate loans—

- I. Acceptances of other banks discounted.
- J. Acceptances of this bank purchased or discounted.
- K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

## THE NATIONAL BANK OF TACOMA

NAME

*American Wood Pipe Co.*

ADDRESS

SHEET NO. 8

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYEE	Amount	Date of Payment
4861	3/10/27	American Wood Pipe Co.		30 D	4/9/27	35	7 D		6000	4-19-27	98740	5-10-27			
4890	3/11/27	"		90 D	6/29/27	34550	7 D		19780	6-30-27	108780	6-24-27			
4899	4/11/27	"		30 D	5/9/27	29170	7 D		5000	5-10-27	98740	7-27-27			
5012	4/19/27	"		90 D	7/28/27	175			10000	8-10-27	100000	8-4-27			
5025	5/5/27	"		90 D	8/3/27	245	7 D		10000	8-5-27	101540	8-4-27			
5032	5/11/27	"		90 D	8/7/27	8750	7 D		5000	8-17-27	87500	8-5-27			
5051	5/14/27	"		90 D	8/12/27	875	7 D		50000	8-19-27	90240	8-5-27			
5099	6/20/27	"		30 D	7/27/27	2917	7 D		5000	7-27-27	95390	8-15-27			
5081	6/26/27	"		90 D	9/27/27		7 D		19780	9-6-27	96390	8-16-27			
5099	8/1/27	"		90 D	8/24/27	408	7 D		1300	8-20-27	93640	8-16-27			
5099	8/1/27	"		15 D	8/14/27		7 D		1500	8-30-27	92340	8-20-27			
5083	8/5/27	"		90 D	10/26/27	175	7 D		10000	11-2-27	86740	8-30-27			
5083	8/10/27	"		90 D	11/8/27	1388	7 D		5700	8-24-27	86440	9-1-27			
5099	8/16/27	"		90 D	11/5/27	2392	7 D		1000	12-17-27	76700	1-6-27			
5086	8/22/27	"		90 D	11/5/27	8750	7 D		5000	11-8-27	76500	9-9-27			
5086	8/22/27	"		90 D	11/10/27	875	7 D		50000	11-17-27	76300	9-12-27			
5099	8/22/27	"		15 D	8/19/27		7 D		1000	9-1-27	76000	9-18-27			
5099	8/22/27	"		15 D	8/19/27		7 D		700	9-9-27	72430	9-19-27			
5081	6/20/27	"		90 D	9/27/27		7 D		10000	9-24-27	77480	10-3-27			
5099	8/4/27	"		15 D	8/19/27		7 D		500	9-12-27	76930	10-25-27			
5099	8/4/27	"		15 D	8/19/27	1056	7 D		300	9-18-27	71930	11-8-27			
5061	6/29/27	"		90 D	9/27/27	30958	7 D		6480	10-1-27	71430	11-9-27			
5061	7/29/27	"		90 D	12/28/27	11253	7 D		6480	1-9-28	78228	11-15-27			
5061	10/3/27	"			10/10/27		7 D		5000	10-25-27	70328	11-30-27			
5061	10/3/27	"			10/10/27		7 D		4500	11-9-27	69348	12-17-27			
5061	10/26/27	"		90 D	1/24/28	175	7 D		10000	1-25-28	69330	1-9-27			
5061	11/8/27	"		15 D	11/23/27	1167	7 D		4000	11-30-27	72130	1-20-28			
5061	11/17/27	"		30 D	12/17/27	29163	7 D		50000	1-6-28	64480				

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SHEET NO.

## THE NATIONAL BANK OF TACOMA

NAME

ADDRESS

1. On demand, paper with one or more individual or firm names (not secured by collateral).  
 2. On demand, secured by stock and bonds.  
 3. On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 4. On time, paper with one or more individual or firm names (not secured by collateral).  
 5. On time, secured by stocks and bonds.  
 6. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.  
 7. Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended.

## CLASSIFICATION

1. On farm land.  
 2. On other real estate.  
 3. Secured by real estate mortgages or other liens on lands not in accordance with Section 24, Federal Reserve Act, as amended.  
 4. For debts previously contracted (Section 217, F.R.A.).  
 5. Farm Lands.  
 6. Other real estate.  
 7. All other real estate loans—  
 A. Farm Lands.  
 B. Other real estate.  
 8. Acceptances of other banks discounted.  
 9. Acceptances of this bank (purchase or discount).  
 10. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Reserve Act, as amended:

1. On farm land.  
 2. On other real estate.  
 3. Secured by real estate mortgages or other liens on lands not in accordance with Section 24, Federal Reserve Act, as amended.  
 4. For debts previously contracted (Section 217, F.R.A.).  
 5. Farm Lands.  
 6. Other real estate.  
 7. All other real estate loans—  
 A. Farm Lands.  
 B. Other real estate.  
 8. Acceptances of other banks discounted.  
 9. Acceptances of this bank (purchase or discount).  
 10. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

Number	Date of Item	MAKER	ENDORSEES	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		PAYER	Amount	Date
											Amount	Date					
5828	10527	American Wood Pipe Co		90D	1328	5025	72	289555	1-9-28	69280	2-4-28						
6001	12112	"		30D	11628	29166	72	50000	1-45-28	66450	2-7-28						
6004	1228	"		30D	2228	1800	72	2900	2-4-28	68280	2-28-28						
6005	1228	"		30D	3228	11253	72	6450	2-2-28	65000	4-2-28						
6006	12028	"		30D	12028	980	72	2800	2-7-28	55000	4-20-28						
6007	12028	"		30D	42328	125	72	10000	4-27-28	57500	5-12-28						
6008	21528	"		30D	21528	29167	72	50000	2-17-28	47500	6-9-28						
6009	22828	"		30D	31428	29167	72	50000	2-20-28	45000	6-12-28						
6010	31428	"		30D	41528	29167	72	50000	4-20-28	49500	6-28-28						
6011	41528	"		30D	61528	8847	72	5000	6-28-28	56000	6-30-28						
6012	42828	"		30D	51528	23333	72	40000	5-16-28	51000	7-17-28						
6013	51228	"		30D	72228	125	72	10000	6-7-28	56000	7-21-28						
6014	51528	"		30D	61528	23333	72	40000	6-19-28	56500	8-7-28						
6015	61528	"		30D	71528	23333	72	40000	7-17-28	56050	8-16-28						
6016	62128	"		30D	91928	17549	72	9500	9-14-28	51050	8-17-28						
6017	63028	"		30D	92828	7	72	6500	8-16-28	50550	8-14-28						
6018	71128	"		30D	81328	20417	72	35000	8-17-28	49550	9-19-28						
6019	72128	"		30D	82028	7	72	5000	8-6-28	40050	9-14-28						
6020	72128	"		30D	82028	7	72	4500	8-24-28	38000	10-2-28						
6021	81728	"		30D	92828	11471	72	6050	10-2-28	25000	10-10-28						
6022	81328	"		30D	91228	175	72	30000	9-21-28	20000	11-15-28						
6023	72128	"		30D	82028	4210	72	4000	9-7-28								
6024	91628	"		30D	10628	2644	72	4000	10-10-28								
6025	91228	"		30D	121228	125	72	30000	10-25-28								
6026	111128	"		30D	111128	14515	72	25000	11-15-28								
6027	121128	"		30D	121128	11467	72	20000	12-13-28								



# CLASSIFICATION

On Demand paper with one or more individual or firm names (not secured by other assets).  
 On Demand, secured by stock and bonds.  
 On Demand, secured by other personal securities, including merchandise warehouse receipts, etc.  
 On time paper with one or more individual or firm names (not secured by collateral).  
 On time, secured by stocks and bonds.  
 On time, secured by other personal securities, including merchandise warehouse receipts, etc.  
 Secured by improved real estate under authority of Section 24, Federal

Reserve Act, as amended:  
 I. On farm land.  
 II. Secured by real estate mortgage or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended:  
 1. For debts previously contracted (Section 1137, R.S. U.S.).  
 A. Farm lands.  
 2. All other real estate loans—  
 A. Farm lands.  
 B. Other real estate.  
 I. Acceptances of other banks discounted.  
 J. Acceptances of this bank purchased or discounted.  
 K. Customers' liability on account of drafts paid under letters of credit and for which this bank has not been reimbursed.

## THE NATIONAL BANK OF TACOMA

SHEET NO. 10-

NAME

American Wood Pipe Co

ADDRESS

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Date of Payment
7611	12/11/29	American Wood Pipe Co		30d	1/10/29	1767			15000	1-14-29	51185	2-28-29			
7613	12/29	"		D	D	486	7	D	500	3-12-29	51545	2-15-29			
7616	1/1/29	"		90d	4/1/29	4222	7	7	24200	4-6-29	51045	3-12-29			
7617	12/31/28	"	Transposition	90d	3/31/29		7	7	26485	2-25-29	43585	3-24-29			
7617	12/31/28	"		90d	3/31/29		7	7	26545	3-29-29	44484	4-6-29			
7617	12/31/28	"		90d	3/31/29	47065	7	7	19385	4-6-29	43984	4-9-29			
7621	4/1/29	"		D	D		7	D	43500	4-19-29	43500	4-10-29			
7621	4/1/29	"		D	D		7	D	98443	4-9-29	33119	4-10-29			
7622	4/1/29	"		D	D	172	7	D	48403	4-10-29	33001	4-12-29			
7622	4/1/29	"		D	D		7	D	33119	4-24-29	31831	5-7-29			
7622	4/1/29	"		D	D		7	D	33001	5-7-29	31768	5-8-29			
7622	4/1/29	"		D	D		7	D	31831	5-8-29	31756	5-15-29			
7622	4/1/29	"		D	D		7	L	31768	5-15-29	31724	5-22-29			
7622	4/1/29	"		D	D		7	L	31756	5-22-29	31583	5-29-29			
7622	4/1/29	"		D	D		7	L	31724	5-29-29	31581	6-3-29			
7622	4/1/29	"		D	D		7	L	31583	6-1-29	26988	8-14-29			
7622	4/1/29	"		D	D		7	L	31581	8-14-29	25988	8-24-29			
7622	4/1/29	"		D	D		7	L	26988	8-20-29	25470	10-4-29			
7622	4/1/29	"		D	D		7	D	25988	10-4-29	25472	10-17-29			
7622	4/1/29	"		D	D		7	D	25472	10-17-29	20147	10-22-29			
7622	4/1/29	"		D	D		7	D	20147	10-24-29	20094	11-6-29			
7622	4/1/29	"		D	D		7	D	20094	11-6-29	20044	11-10-29			
7622	4/1/29	"		D	D		7	D	20044	11-10-29	20066	11-10-29			
7622	4/1/29	"		D	D		7	D	20066	11-10-29	19065	11-10-29			
7622	4/1/29	"		D	D		7	D	19065	11-10-29	18906	11-10-29			
7622	4/1/29	"		D	D		7	D	18906	11-10-29	18070	11-10-29			
7622	4/1/29	"		D	D		7	D	18070	11-10-29	17191	11-10-29			
7622	4/1/29	"		D	D		7	D	17191	11-10-29	16070	11-10-29			





SHEET NO.

THE NATIONAL BANK OF TACOMA

- CLASSIFICATION**
- A. On demand, paper with one or more individual or firm names (not secured by collateral).
  - B. On demand, secured by stock and bonds.
  - C. On demand, secured by other personal securities, including merchandise, warehouse receipts, etc.
  - D. On time paper with one or more individual or firm names (not secured by collateral).
  - E. On time, secured by stocks and bonds.
  - F. On time, secured by other personal securities, including merchandise, warehouse receipts, etc.
  - G. Secured by improved real estate under authority of Section 24, Federal

Reserve Act, as amended:

- 1. On farm land.
- 2. On other real estate.
- 3. Secured by real estate mortgages or other liens on realty not in accordance with Section 24, Federal Reserve Act, as amended.
- 4. For debts previously contracted. Section 312, R. S. 1906.
- 5. All other real estate loans--
  - A. Farm lands.
  - B. Other real estate.
- 6. Acceptances of other banks discounted.
- 7. Acceptances of this bank, purchased or discounted.
- 8. Customers' liability on accounts of drafts paid under letters of credit and for which this bank has not been reimbursed.

NAME

ADDRESS

Number	Date of Item	MAKER	ENDORSERS	Time	When Due	Interest Received	Rate	Class	Amount	Date of Payment or Renewal	TOTAL DIRECT		ENTERED AS DIRECT UNDER NAME INDICATED		
											Amount	Date	PAYER	Amount	Interest
78324	4/1/29	American Wood Pipe Co		10	10		7	10	17191.45	5-14-31					
78329	4/1/29	"		10	10		7	10	17090.45						



WHEREFORE the defendant prays that the foregoing bill of exceptions be settled and allowed, and an order entered herein so providing.

Dated this 5th day of January, 1932.

J. SPEED SMITH and  
HENRY J. ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant. [181]

[Title of Court and Cause—No. 8176.]

# CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

The time for filing defendant's proposed bill of exceptions having been duly extended herein by order of this court made and entered herein upon the 21st day of November, 1931, up to and including the 12th day of January, 1932; and

This Court having, upon the 30th day of January, 1932, made and entered herein the following Order:

“IT IS ORDERED: That this Court will retain jurisdiction over this cause beyond the expiration of the present term of this court for all purposes and particularly for the purpose of settling a bill of exceptions herein allowing a writ of error herein, and fixing the amount of a cost and supersedeas bond herein, should a writ of error be allowed.”

It is hereby CERTIFIED AND ORDERED: That the above-mentioned bill of exceptions, pages



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numbered one to one hundred eleven, containing all the evidence given or offered in the case of the National Bank of Tacoma, a National Banking Corporation, Plaintiff, vs. The Aetna Casualty & Surety Company, a Corporation, Defendant, No. 8176, and correctly shows the proceedings had on said trial, as I verily believe; and said bill of exceptions is hereby APPROVED, ALLOWED AND SETTLED and made a part of the record herein.

Given under the hand of the Judge of said court, before whom said proceedings were had, this 13th day of February, 1932.

EDWARD E. CUSHMAN, (Signed)  
United States District Judge for the Western District of Washington, Southern Division. [182]

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[Title of Court and Cause—No. 8176.]

ASSIGNMENT OF ERRORS.

Now comes the defendant, Aetna Casualty and Surety Company, and says that the judgment entered in the above cause on the twenty-first day of November, 1931, is erroneous and unjust to defendant for the following reasons:

I. That the evidence is insufficient to sustain any recovery by the plaintiff.

II. The court erred in refusing the motion of the defendant to dismiss the action and to direct a verdict in favor of the defendant at the conclusion of the evidence.

III. The court erred in directing a verdict in favor of the plaintiff.

IV. The court erred in construing the surety bond executed by the defendant as a guaranty for the payment of money.

V. The court erred in construing the surety bond executed by the defendant as a contract of indemnity.

VI. The court erred in refusing to hold that the plaintiff was estopped to deny the recitals of the bond.

VII. The court erred in permitting the plaintiff to introduce evidence to vary the terms of the bond as follows:

a. The plaintiff was permitted to introduce evidence that prior to the writing of the bond in question it was the [184] practice of the Wood Pipe Company to borrow money on bills of lading and assigned invoices covering goods shipped to its customers.

b. The plaintiff was further permitted to introduce testimony that some time in 1928 the Wood Pipe Company made application to the bank for loans on advances against shipments before the goods were manufactured and shipments actually made, and offered to secure an indemnity bond to guaranty delivery of the goods.

c. The plaintiff was permitted to introduce testimony that the plaintiff's officers informed the Wood Pipe Company that such bond must cover two things; first, that there was a writ-

## 170 *The Aetna Casualty & Surety Company*

ten and enforceable order, and second, that the order would be filled according to its terms.

d. The plaintiff was permitted to introduce testimony as to its construction of the bond before it was written.

e. The plaintiff was permitted to introduce testimony that on December 26, 1928, the bank held similar bonds of the defendant in the sum of \$37,000.

f. The plaintiff was permitted to offer testimony that it expected to receive the full amount of the assigned invoice, to wit, \$3950.00.

g. The plaintiff was permitted to introduce testimony contradicting the recitals of the bond to the effect that there was a written order.

VIII. The court refused to permit the defendant to show that the claimed loan to the Wood Pipe Company was simply money which the plaintiff itself applied against the overdraft of the Wood Pipe Company at that time, and did not constitute an advance of money to the Wood Pipe Company.

IX. The court erred in entering judgment in the sum of \$4244.36 for the following reasons: [185]

a. There was a failure of proof as to any damage whatsoever under the bond.

b. In any event, the bond could not have been held liable for any greater sum than \$3375.00.

c. In any event the plaintiff could not have re-

covered against the bond any greater amount than one-half of the penal sum, to wit, \$2,000.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant,  
412 Dexter Horton Building,  
Seattle, Washington.

[Endorsed]: Filed Feb. 15, 1932. [186]

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[Title of Court and Cause—No. 8176.]

### PETITION FOR APPEAL.

To the Honorable EDWARD E. CUSHMAN,  
Judge of the Above-entitled Court:

The above-named defendant, The Aetna Casualty & Surety Company, feeling itself aggrieved by the judgment made and entered in this cause on the twenty-first day of November, 1931, does hereby appeal from said judgment, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, will be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in San Francisco, State of California.



172 *The Aetna Casualty & Surety Company*

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made, and desiring to supersede the execution of the judgment, petitioner herewith tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,

HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Petitioner, Aetna Casualty and  
Surety Company, Defendant, 412 Dexter Hor-  
ton Building, Seattle, Washington.

Filed Feb. 15, 1932. [187]

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[Title of Court and Cause—No. 8176.]

STIPULATION.

It is stipulated and agreed, by and between the parties hereto, as follows:

1. That the defendant may make application to the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, for an order allowing its appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and for a citation on appeal and for an order fixing the amount of a cost and supersedeas bond, at any time and without notice to the plaintiff or its attorneys, and that said application may be made either in

the city of Tacoma, Washington, at the United States Federal Building, or in the city of Seattle, Washington, in the United States Federal Building, in said city.

2. That in the event that the Court shall allow said appeal, then the amount of a cost and superseas bond to be furnished by the defendant aforesaid for said appeal shall be \$6,000.00.

Dated, this 15th day of February, 1932.

HAYDEN, METZGER & BLAIR,  
Attorneys for Plaintiff.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 19, 1932. [188]

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[Title of Court and Cause—No. 8176.]

ORDER ALLOWING APPEAL AND FIXING  
AMOUNT OF COST AND SUPERSEDEAS  
BOND ON APPEAL.

This cause coming on this day to be heard, pursuant to the stipulation of the parties on file herein, upon the petition of the defendant, The Aetna Casualty & Surety Company, herein filed, praying the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, and also praying that a transcript of the record and

proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises:

The Court having duly considered the same, does hereby allow the said appeal prayed for.

IT IS FURTHER ORDERED, that the amount of bond to be given as a cost and supersedeas bond, by the defendant during the pendency of this appeal, be and the same is hereby fixed in the sum of \$6,000.00.

Done in Seattle, this 18 day of February, 1932.

EDWARD E. CUSHMAN,  
District Judge.

[Endorsed]: Filed Feb. 18, 1932, at Seattle. Ed. M. Lakin, Clerk.

Filed Feb. 19, 1932, at Tacoma. Ed. M. Lakin, Clerk. By E. Redmayne, Deputy. [189]

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[Title of Court and Cause—No. 8176.]

### BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That The Aetna Casualty & Surety Company, a Corporation, defendant herein, as principal, and National Surety Company, a corporation organized under the laws of the State of New York and authorized to transact and transacting a business of surety in the State of Washington, as surety, are

held and firmly bound unto The National Bank of Tacoma, a national banking corporation, plaintiff herein, in the full and just sum of Six Thousand Dollars (\$6,000) to be paid to the said The National Bank of Tacoma, the plaintiff, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of February, 1932.

WHEREAS, lately in the District Court of the United States for the Western District of Washington, Southern Division, in a suit pending in said court between The National Bank of Tacoma, a national banking corporation, as plaintiff, and The Aetna Casualty & Surety Company, a corporation, defendant, numbered 8176, a judgment was rendered against the said The Aetna Casualty & Surety Company in the sum of Four Thousand Two Hundred and Forty-four and 36/100 Dollars (\$4,244.36), together with interest on said sum from the date of the entry of the judgment, to wit, the twenty-first day of November, 1931, at the rate of six per [190] cent (6%) per annum until fully paid, together with costs herein taxed in the sum of Fifty-nine and 20/100 Dollars (\$59.20) and the said Aetna Casualty and Surety Company having obtained an appeal to the Circuit Court of the United States for the Ninth Circuit, and having filed a copy thereof in the office of the Clerk of said court to reverse the said judgment and the whole of it, and a citation directed to the said The National Bank of Tacoma, plaintiff, citing and ad-



monishing it to be and appear at a session of the Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the second day of May, 1932.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said The Aetna Casualty & Surety Company, the defendant herein, shall prosecute its appeal to effect and will pay the amount of said judgment and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Executed this 13th day of February, 1932.

THE AETNA CASUALTY & SURETY  
COMPANY,

By J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
Its Attorneys of Record.

NATIONAL SURETY COMPANY,

By ROBERT WHYTE,  
Its Resident Vice-President.

[Corporate Seal] Attest: J. H. LOBDELL,  
Its Resident Assistant Secretary.

[Endorsed]: Filed Feb. 19, 1932. [191]

The foregoing bond is hereby approved this 19th day of February, 1932.

EDWARD E. CUSHMAN,  
Judge of the United States District Court for the  
Western District of Washington, Southern  
Division.

[Endorsed]: Filed Feb. 19, 1932. [192]

[Title of Court and Cause—No. 8176.]

STIPULATION FOR TRANSMISSION OF  
ORIGINAL EXHIBITS.

In order to save expense and facilitate the printing of the transcript on the appeal herein,—

IT IS HEREBY STIPULATED, between the parties hereto, through the undersigned attorneys, that all of the original exhibits herein, consisting of Plaintiffs' Exhibit Nos. 1 to 25, inclusive, shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, this 26th day of February, 1932.

HAYDEN, METZGER & BLAIR,  
Attorneys for Plaintiff.

HENRY ELLIOTT, Jr.,  
J. SPEED SMITH,

HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant.

Filed Feb. 26, 1932. [193]

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[Title of Court and Cause—No. 8176.]

ORDER FOR TRANSMISSION OF ORIGINAL  
EXHIBITS.

Pursuant to the written stipulation of the parties  
on file herein, and it being, in the opinion  
E.E.C. of the court deemed proper,

IT IS HEREBY ORDERED; That all the origi-

178 *The Aetna Casualty & Surety Company*

nal exhibits mentioned in said stipulation, to wit: Plaintiff's Exhibit Nos. 1 to 25, inclusive, shall be forwarded by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Done ~~in open court~~, this 26 day of February, 1932.

EDWARD E. CUSHMAN,  
District Judge.

OK. as to form.

HAYDEN, METZGER & BLAIR,  
Attys. for Plff.

[Endorsed]: Filed Feb. 26, 1932. [194]

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[Title of Court and Cause—No. 8176.]

PRAECIPE FOR TRANSCRIPT OF RECORD  
ON APPEAL.

To the Clerk of the Above-entitled Court:

You are hereby requested to prepare, certify and file in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, a transcript of record, and to include in such transcript of record the following papers, documents and exhibits filed in your office in the above-entitled cause, to wit:

1. Transcript of removal proceedings on the removal of the above-entitled cause from the Superior Court of the State of Washington, in and for Pierce County, to the above-en-

titled court, filed on the 4th day of September, 1930.

2. Defendant's notice of removal to United States District Court, filed September 5, 1930.
3. Demurrer of defendant to complaint, filed October 1, 1930.
4. Motion of defendant to make more definite and certain, filed October 1, 1930.
5. Order of court on defendant's motion to make more definite and certain and demurrer, signed and filed March 18, 1931.
6. Exception of defendant to order overruling demurrer and partially denying motion to make more definite and certain, filed March 23, 1931.
7. Amended complaint filed April 1, 1931.
8. Answer to amended complaint filed April 8, 1931. [195]
9. Reply to answer, filed May 5, 1931.
10. Verdict of jury for plaintiff, filed November 13, 1931.
11. Final judgment, signed and filed November 21, 1931.
12. Order extending time in which to file proposed bill of exceptions, filed November 21, 1931.
13. Motion of defendant to vacate judgment, set aside verdict and grant a new trial, filed December 28, 1931.
14. Order overruling defendant's motion to vacate judgment and for a new trial, filed Jan. 4, 1932.
15. Order extending term, filed January 30, 1932.
16. Assignment of errors.



180 *The Aetna Casualty & Surety Company*

17. Petition for appeal.
18. Stipulation for presentation of appeal and for amount of cost bond, filed February 19, 1932.
19. Order allowing appeal, filed February 19, 1932.
20. Cost and supersedeas bond on appeal, filed February 19, 1932.
21. Citation on appeal, issued February 18, 1932.
22. Affidavit of service or order allowing appeal and bond, filed February 24, 1932.
23. Bill of exceptions.
24. Stipulation for transmission of original exhibits, filed February 26, 1932.
25. Order for transmission of original exhibits, filed February 26, 1932.
26. Clerk's certificate of transcript on appeal.
27. This praecipe.

Said transcript of record to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the Circuit Court of Appeals of the Ninth Circuit in San Francisco, California, on or before the 18th day of March, 1932. [196]

Dated, this 29th day of February, 1932.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 27, 1932. [197]

[Title of Court and Cause—No. 8176.]

NOTICE OF FILING OF PRAECIPE FOR  
TRANSCRIPT ON APPEAL.

To the Plaintiff Herein and to Its Attorneys, Hay-  
den, Metzger & Blair:

You and each of you are hereby notified that  
the defendant will, upon the 29th day of February,  
1932, file with the Clerk of the above-entitled court  
the attached praecipe for transcript on appeal, a  
copy of which has been served upon you.

J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,

Attorneys for Defendant.

[Endorsed]: Filed February 27, 1932. [198]

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[Title of Court and Cause—No. 8176.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

I, Ed. M. Lakin, Clerk of the United States Dis-  
trict Court for the Western District of Washing-  
ton, do hereby certify and return that the fore-  
going transcript of record consisting of pages num-  
bered from one to 190, inclusive, is a full true and  
correct copy of so much of the record, papers and  
proceedings in the case of the National Bank of  
Tacoma, a national banking corporation, plaintiff

and appellee, vs. the Aetna Casualty and Surety Company, a corporation, defendant and appellant, cause No. 8176, in said court as required by praecipe of counsel filed and of record in my office in said court at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I herewith attach and transmit the original citation in this cause, with acceptance of service thereon.

I do further certify that under separate cover and certificate, I am forwarding to said Circuit Court of Appeals the original exhibits numbered from 1 to 25, both inclusive, as provided, for in stipulation of counsel and order of court filed in this cause and made a part of this transcript.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and paid by and on behalf of the appellant herein the preparation of this transcript, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Appeal fee .....	\$ 5.00
Clerk's fee (Act. Feb. 11, 1925) for making	
record—658 folios @ 5 cents per folio ....	32.90
Clerk's certificates .....	1.00

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Total .....\$38.90

I do further certify that the cost of preparing record on appeal amounting to \$38.90 has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed, at the City of Tacoma, in the Western District of Washington, this 9th day of March, A. D. 1932.

[Seal]

ED. M. LAKIN,  
Clerk.

By E. W. Pettit,  
Deputy. [199]

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[Title of Court and Cause—No. 8176.]

CITATION ON APPEAL.

The President of the United States to the Above-named Plaintiff, and to HAYDEN, LANGHORNE & METZGER, Its Attorneys,  
GREETING:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden in San Francisco in the State of California, within (30) days from the order allowing

date hereof, pursuant to ~~notice of~~ appeal  
EEC filed in the Clerk's office of the District Court  
this day made

of the United States for the Western District  
of Washington, Southern Division, wherein The National Bank of Tacoma is appellee and The Aetna Casualty & Surety Company is appellant, to show cause if any there be why the judgment rendered  
the petition for and assignment of errors  
upon

EEC against the said appellant as in ~~said notice of~~  
appeal ~~mentioned~~, should not be corrected,



and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, District Court Judge of the United States at Tacoma, Washington, within said District, this 18th day of Feb., 1932.

[Seal]

EDWARD E. CUSHMAN,  
District Judge.

Service of the within citation and receipt of copy thereof admitted this 20th day of Feb., 1932.

HAYDEN, METZGER & BLAIR,  
Attorneys for Appellee. [200]

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[Endorsed]: No. 6789. United States Circuit Court of Appeals for the Ninth Circuit. The Aetna Casualty & Surety Company, a Corporation, Appellant, vs. The National Bank of Tacoma, a National Banking Association, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed March 16, 1932.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 6789.

THE NATIONAL BANK OF TACOMA, a Na-  
tional Banking Corporation,  
Plaintiff and Appellee,  
vs.

THE AETNA CASUALTY AND SURETY COM-  
PANY, a Corporation,  
Defendant and Appellant.

STIPULATION FOR PRINTING OF TRAN-  
SCRIPT OF RECORD.

It is hereby STIPULATED AND AGREED by the parties to the above-entitled cause, through their respective counsel, that the printed transcript of record herein shall consist of the following, which it is agreed comprises all parts of the record deemed by any party to be in anywise material to the consideration of said cause in the Circuit Court of Appeals in reviewing said cause on the appeal taken out herein, to wit:

1. Original complaint, with exhibits attached thereto, appearing on pages 2 to 15, inclusive, of transcript of record.
2. Special appearance of defendant in state court, page 16, transcript.
3. Petition for removal.
4. Bond on removal.
5. Order for removal.

6. Notice of filing of petition for removal (pp. 17-23, Trp.).
7. Certificate of removal (p. 24, Trp.).
8. Notice of removal (p. 25, Trp.).
9. Demurrer (p. 26, Trp.).
10. Motion to make more definite and certain (pp. 27-28, inc., Trp.).
11. Order on motion to make more definite and certain and demurrer and exception of defendants thereto (pp. 29-31, inc., Trp.).
12. Amended complaint and exhibits attached thereto (pp. 32-34, inc., Trp.).
13. Answer to amended complaint (pp. 45-49, inc., Trp.).
14. Reply (pp. 50-51, inc., Trp.).
15. Verdict of July (p. 52, Trp.).
16. Judgment (pp. 53-54, inc., Trp.).
17. Order extending time to file bill of exceptions (p. 55, Trp.).
18. Motion of defendant to vacate judgment and set aside verdict (pp. 56-58, inc., Trp.).
19. Order denying foregoing motion (p. 59, Trp.).
20. Order extending the term (p. 60, Trp.).
21. Assignments of error (pp. 61-63, inc., Trp.).
22. Petition for appeal (p. 64, Trp.).
23. Stipulation for presentation of appeal and cost of supersedeas bond (p. 65, Trp.).
24. Order allowing appeal and fixing cost of supersedeas bond (p. 66, Trp.).
25. Bond on appeal (pp. 67-69, inc., Trp.).
26. Bill of exceptions, except that there shall only be printed the exhibits hereinafter specifically set out.

27. Certificate of Judge to bill of exceptions (p. 182, Trp.).
27. Stipulation for transmission of original exhibits (p. 184, Trp.).
28. Order for transmission of original exhibits (p. 185, Trp.).
29. Praeceptum for transcript on appeal (pp. 186-188, inc., Trp.).
30. Notice of filing of praecipe (p. 189, Trp.).
31. Certificate of Clerk to transcript of record (p. 190, Trp.).
32. Citation on appeal (p. 191, Trp.).
33. This stipulation.

And the following exhibits:

#### PLAINTIFF'S EXHIBITS.

1. Plaintiff's Exhibits Nos. 1 to 6, inclusive, attached to the bill of exceptions and appearing on pages 116 to 134, inclusive, of the typewritten transcript of record need not be printed, but in lieu thereof print this:

“Plaintiff's Exhibits Nos. 1 to 6, inclusive, omitted from the printed record by stipulation, it being stipulated and agreed that the defendant and its agents who signed and executed the bond here sued on were duly authorized to execute and deliver said bond.”

2. Exhibits Nos. 7 to 10, inclusive, attached to the bill of exceptions and appearing on pages 135 to 138, inclusive, of the type-



written transcript of the record need not be printed, but in lieu thereof print this:

“Exhibits Nos. 7 to 10, inclusive, omitted from the printed record by stipulation, it being stipulated and agreed that they relate exclusively to matters in no way involved in this appeal.”

3. Exhibit No. 11 attached to the bill of exceptions and appearing on page 139 of the typewritten transcript of the record need not be printed, but in lieu thereof print this:

“Exhibit No. 11 omitted from the printed record by stipulation, it being stipulated and agreed that it is the original bond here sued on and that Exhibit ‘C’ attached to the original complaint and printed as a part of said complaint is a true copy of said bond.”

4. Plaintiff’s Exhibit No. 12 to the bill of exceptions, appearing upon page 140 of the typewritten transcript of record, to be printed.
5. Plaintiff’s Exhibit No. 13 attached to the bill of exceptions and appearing upon pages 141 and 142 of the typewritten transcript of the record need not be printed, but in lieu thereof print this:

“Plaintiff’s Exhibit No. 13 omitted from the printed record by stipulation, it being stipulated and agreed that said exhibit is a copy of the general loan and collateral agreement, a copy of which is attached as Exhibit ‘A’ to the plaintiff’s original complaint and printed as part of said original complaint.”

6. Plaintiff's Exhibits Nos. 14 to 17, inclusive, attached to the bill of exceptions and appearing upon pages 143 to 146 of the typewritten transcript of the record need not be printed, but in lieu thereof print this:

“Plaintiff's Exhibits Nos. 14 to 17, inclusive omitted from the printed record by stipulation, it being stipulated and agreed that they relate exclusively to matters in no way involved in this appeal.”

7. Plaintiff's Exhibit No. 18 attached to the bill of exceptions and appearing upon page 147 of the typewritten transcript of the record need not be printed, but in lieu thereof print this:

Plaintiff's Exhibit No. 18 omitted from the printed transcript by stipulation, it being stipulated and agreed that said exhibit is the original memorandum or assignment note, of which Exhibit 'D' attached to plaintiff's original complaint and printed as part of said complaint is a true copy.”

8. Plaintiff's Exhibit No. 19 attached to the bill of exceptions and appearing upon page 148 of the typewritten transcript of the record need not be printed, but in lieu thereof print this:

“Plaintiff's Exhibit No. 19 omitted from the printed transcript of the record by stipulation, it being stipulated and agreed that said exhibit is the original invoice and assignment, of which Exhibit 'B' attached to the plaintiff's original

complaint and printed as a part of said original complaint is a true copy.”

9. Plaintiff’s Exhibit No. 20 attached to the bill of exceptions and appearing on page 149 of the typewritten transcript of the record need not be printed, but in lieu thereof print this:

“Plaintiff’s Exhibit No. 20 omitted from the printed transcript by stipulation, it being stipulated and agreed that said exhibit relates exclusively to matters in no way involved in this appeal.”

10. Plaintiff’s Exhibit No. 21 to the bill of exceptions, appearing upon pages 150 to 153, inclusive, of the typewritten transcript of record, to be printed.
11. Plaintiff’s Exhibit No. 23, appearing upon page 155 of the transcript, to be printed.
12. Plaintiff’s Exhibits Nos. 24 and 25, appearing upon pages 156 to 180, of the typewritten transcript of record, to be printed or placed in the record by photostatic copies, if such photostatic copies will facilitate the printing of the record.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that neither the execution of this stipulation nor anything herein contained shall constitute or be construed as an admission on the part of the appellee that the parts of the record hereinbefore designated to be printed were necessary or material to the

consideration of the appeal in this cause, nor in any way prejudice the appellee from hereafter claiming that said printed record was needlessly encumbered and the cost thereof unnecessarily increased by including therein portions of the record in no manner material to the due consideration of this appeal.

It is hereby FURTHER STIPULATED AND AGREED by and between the parties hereto that in the printing of this record all titles, captions, jurats and verifications may be omitted.

It is FURTHER STIPULATED AND AGREED that this record may be printed under the supervision of the Clerk of the Circuit Court of Appeals, Ninth Circuit, at San Francisco, California and expressly waive the provisions of the Act of February 13, 1911, relative to the District Court having supervision thereof.

Dated at Tacoma, Washington, this 15th day of March, 1932.

HAYDEN, METZGER & BLAIR,  
Attorneys for Plaintiff and Appellee,  
J. SPEED SMITH and  
HENRY ELLIOTT, Jr.,  
HENDERSON, CARNAHAN & THOMP-  
SON,  
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Mar. 19, 1932. Paul P. O'Brien, Clerk.





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UNITED STATES  
CIRCUIT COURT OF APPEALS  
NINTH CIRCUIT

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THE AETNA CASUALTY & SURETY  
COMPANY, a corporation,

*Appellant,*

vs.

THE NATIONAL BANK OF TACOMA, a  
National Banking Association,

*Appellee.*

No. ....

---

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION

---

Brief of Appellant

---

J. SPEED SMITH and HENRY ELLIOTT, JR.

412 Dexter Horton Building  
Seattle, Washington

HENDERSON, CARNAHAN AND THOMPSON,

Scott Z Henderson

Frank M. Carnahan

L. L. Thompson

1414 Puget Sound Bank Building  
Tacoma, Washington.

*Attorneys for Appellant.*



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UNITED STATES  
CIRCUIT COURT OF APPEALS  
NINTH CIRCUIT

---

THE AETNA CASUALTY & SURETY COMPANY, a corporation,  vs.  THE NATIONAL BANK OF TACOMA, a National Banking Association,	}	No.....
<i>Appellant,</i>		
<i>Appellee.</i>		

---

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION

---

**Brief of Appellant**

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STATEMENT OF THE CASE

This is an action by appellee (plaintiff) in the court below), hereinafter called the “bank,” against the appellant (defendant in the court below), hereinafter called the “surety,” to recover upon a bond executed by American Wood Pipe Company as principal and the Surety Company as surety to the Bank and/or Twin Harbors Lumber Company as obligees. The case was originally commenced in the State Court

of the district, but was thereafter removed to the United States District Court of the Western District of Washington upon the ground of diversity of citizenship. (Tr. p. 24.) The case was tried before the court and jury. Upon the conclusion of the bank's testimony the surety moved for a directed verdict, which motion was denied. The surety then rested without introducing any testimony, and thereupon the bank moved for a directed verdict, which was granted. (Tr. p. 116.) The jury, under the direction of the court, returned a verdict against the surety in the sum of \$4244.36. (Tr. p. 50.) Subsequently a judgment in that amount was entered upon the verdict. (Tr. p. 51.) This appeal is prosecuted from such judgment.

The appellee is a national banking corporation, doing a general banking business in the City of Tacoma, Washington. The American Wood Pipe Company is a Washington corporation, whose business, prior to the time that it passed under the hands of a general equity receiver in April, 1929, consisted of the manufacture and sale of wood products, principally wood pipes. (Tr. p. 70.) Upon the 21st day of January, 1929, the bond here sued upon was executed by the Wood Pipe Company as principal and the appellant as surety. Omitting formal parts, the bond reads as follows:

"KNOW ALL MEN BY THESE PRESENTS: That we, American Wood Pipe Company, a corporation of the State of Washington with principal place of business at Tacoma, Washington, as Principal, and The Aetna Casualty and Surety Company of Hartford, Connecticut, as Surety, are held and firmly bound unto Twin Harbors Lumber Company of Aberdeen, Washington, and/or The National Bank of Tacoma, Tacoma, Washington, in the penal sum of Four Thousand and No/100 (\$4,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made the said principal and the said Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Signed and sealed this 21st day of January, A. D. 1929.

The condition of this obligation is such that, whereas, the said principal has accepted a written order from the Twin Harbors Lumber Company of Aberdeen, Washington and/or The National Bank of Tacoma, Tacoma, Washington, dated January 19th, 1929, for furnishing the following quantity of material:

50 M. B. M.  $1\frac{1}{2} \times 4$  8 Ft. S2S  $1\frac{1}{4} \times 3\frac{3}{4}$  Edges Rough at \$41.50 f.o.b. Tacoma.

50 M. B. M.  $1\frac{1}{2} \times 4$  9 Ft. S2S  $1\frac{1}{4} \times 3\frac{3}{4}$  Edges Rough at \$37.50 f.o.b. Tacoma, shipment to be made within sixty days, which order is by reference made a part hereof as fully to all intents and purposes as if set forth at length herein.

NOW, THEREFORE, if the said Principal shall supply the material in accordance with the written order, and if they will indemnify Twin



Harbors Lumber Company of Aberdeen, Washington and/or The National Bank of Tacoma, Tacoma, Washington, against any direct or, indirect damages that may be suffered or claimed for lack of delivery of material within the time called for; and further conditioned as required by law for the payment of all laborers, mechanics, sub-contractors and materialmen, and all persons who shall supply such person or persons or sub-contractors with provisions or supplies for the carrying on of such work, and all just debts, dues and demands incurred in the performance of the work, then and in that event this obligation shall be void, but otherwise it shall remain in full force and effect." (Tr. p. 15.)

The facts upon which recovery against the surety were allowed are substantially as follows: For some years previous to the execution of this bond the Wood Pipe Company had been a heavy borrower from the bank and was also a depositor in that institution, although its balance was usually very small. (Tr. p. 50.) The loans of the Pipe Company were of two classes: (1) Open unsecured loans, and (2) loans which were secured by the assignment of the proceeds of invoices of the Wood Pipe Company covering materials delivered or to be delivered. In addition to this the Wood Pipe Company on August 8, 1921, executed and delivered to the bank a general loan and collateral agreement, which in general terms sought to pledge every chose in action of the Wood Pipe Company in

the bank's possession as security for anything due from the Pipe Company to the bank. (Tr. p. 10.) Plaintiff's Exhibit 24 (Tr. pp. 141 to 161, inc.) shows the status of the specially secured account from May, 1928, to April, 1929. Plaintiff's Exhibit 25 (Tr. pp. 162 to 165, inc.) shows the status of the unsecured open account of the Pipe Company from March, 1927, to the date of the receivership. Upon January 15, 1929, the balance due on the assigned accounts was \$154,899.99, and unsecured loans amounted to \$20,000.00. Upon the date that the bond was executed the balance secured by special assignments was \$160,984.61, and the unsecured balance \$20,000.00. (Tr. p. 94.) Upon January 21, 1929, the Wood Pipe Company executed and delivered to the bank its promissory note in the sum of \$3375.00, which note was in the usual form. (Tr. p. 9.) Upon the back of this note there appeared the following indorsement:

"No. 75583.

THIS NOTE SECURED BY:

Shipment Number 8472.

Consignee, Twin Harbors Lbr. Co.

Destination, Chicago, Ill.

Date Shipped, Jan. 21, 1929.

Invoice .....\$3,950.00

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Less Deductions .....	197.50
Estimated Freight .....	
Margin .....	377.50
<hr/>	
Advance .....	3,375.00
Notify Twin Harbors Lbr. Co., Aberdeen, Wash."	
(Tr. p. 10.)	

Upon the same day the deposit account of the Pipe Company was credited with \$3375.00. (Tr. p. 40.) The record does not affirmatively show just how this credit was used by the Pipe Company. However, when counsel for the surety in the cross-examination of the President of the bank offered to show that at the time of this credit the Pipe Company was overdrawn at the bank, and that the note and assignment was accepted to cover this overdraft, counsel for the bank objected, and this objection was sustained by the lower court. (Tr. p. 90.)

Likewise upon this date the Wood Pipe Company executed and delivered to the bank the following assignment of account:

"American Wood Pipe Co.  
 Tacoma, Wash., January 21, 1929.  
 Req. No. 1/19/28  
 Our Order No. 8472  
 Terms 2% and 5% Com.  
 F.O.B. our mill.  
 Sold to Twin Harbors Lumber Co.,  
 Aberdeen, Washington,  
 Shipped to Above at Chicago, Ill.

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No. 2 Clear & Better Kiln Dried Fir S2S 11¼x3¾"  
Edges Rough 1½x4" 9 length 50,000 ft. \$41.50M

		\$2075.00	
Ditto	8	50,000	37.50M
		1875.00	
		<hr/>	
		\$3950.00	

For value received we hereby assign, sell, transfer and set over unto The National Bank of Tacoma, Tacoma, Wash., the above account together with all title and interest now or hereafter owned in the goods and merchandise for which said account was incurred.

AMERICAN WOOD PIPE COMPANY.

By VAUGHAN MORRILL.

VAUGHAN MORRILL,

President." (Tr. p. 14.)

The bank, however, did not notify the Lumber Company of the execution of this assignment. (Tr. p. 92.) The bank received nothing under the assignment or upon this note, since the Pipe Company passed into the hands of a receiver in the following April. Over the objection of the surety the bank was permitted to show by the testimony of two employees of the Twin Harbors Lumber Company that in fact the order described in the bond and in the assignment was never given by the Twin Harbors Lumber Company. (Tr. pp. 105-112.)



There is no evidence in the record to show that either the surety or its agents had any knowledge of the facts relating to the status of the accounts between the bank and the Wood Pipe Company, other than perhaps a general knowledge that the bank was a creditor of the Wood Pipe Company. The surety had no knowledge that this order had been assigned to the Bank. The application of the Wood Pipe Company for the issuance of this bond appears upon pages 118 to 131, inclusive, of the record. In this application the bond is referred to as a contract bond. (Tr. p. 118.) The names of the obligees are given as "Twin Harbors Lumber Company and/or National Bank of Tacoma," and the nature of the contract is described in the same manner as in the bond.

The bank sued to recover, not the amount advanced upon the alleged security of the bond, but the amount which would have been due had the materials been delivered, plus interest at the rate of six per cent. per annum from the date of the execution of the bond. (Tr. p. 117.) Recovery was allowed substantially as prayed for the in sum of \$4244.36, such sum being the amount of the purchase price, less a dealer's commission of five per cent., and a cash discount of two per cent., and interest from the date of the ap-

pointment of a general receiver for the Pipe Company.

### SPECIFICATIONS OF ERROR

The appellant assigns herein the following prejudicial errors complained to have been committed by the court below :

1. That the evidence is insufficient to sustain any recovery by the bank.

2. The court erred in refusing the motion of the surety to dismiss the action and to direct a verdict in favor of the surety at the conclusion of the evidence. (Tr. pp. 114-168.)

3. The court erred in directing a verdict in favor of the bank. (Tr. pp. 114-169.)

4. The court erred in construing the surety bond executed by the surety as a guaranty for the payment of money. (Tr. pp. 116-169.)

5. The court erred in construing the surety bond executed by the surety as a contract of indemnity. (Tr. p. 169.)

6. The court erred in refusing to hold that the bank was estopped to deny the recitals of the bond. (Tr. pp. 72-169.)

7. The court erred in permitting the bank to introduce evidence to vary the terms of the bond as follows:

*a.* The bank was permitted to introduce evidence that prior to the writing of the bond here sued upon it was the practice of the Wood Pipe Company to borrow money on bills of lading and assigned invoices covering goods shipped to its customers. (Tr. pp. 73-169.)

*b.* The bank was further permitted to introduce testimony that some time in the year 1928 the Wood Pipe Company made application to the bank for loans against shipments before the goods were manufactured and shipments actually made, and that the Pipe Company then offered to secure an indemnity bond to guaranty delivery of the goods. (Tr. pp. 74-169.)

*c.* The bank was permitted to introduce testimony that the officers of the bank informed the officers of the Wood Pipe Company that such bond must cover two things; first, that there was a written and enforceable order, and second, that the order would be filled according to its terms. (Tr. pp. 77-170.)

*d.* The bank was permitted to introduce testimony as to its construction of the bond before the bond was written. (Tr. pp. 80-170.)

*e.* The bank was permitted to introduce testimony that on December 26, 1928, the bank held similar bonds in the sum of \$37,000.00. (Tr. p. 82.)

*f.* The bank was permitted to offer testimony that it expected to receive the full amount of the assigned invoice. (Tr. pp. 87-170.)

*g.* The bank was permitted to introduce testimony contradicting the recitals of the bond to the effect that there was a written order. (Tr. pp. 105, 108, 170.)

8. The court refused to permit the surety to show that this alleged loan to the Wood Pipe Company was simply made to cover an existing overdraft of the Wood Pipe Company, and that in fact no advance was made to the Wood Pipe Company. (Tr. pp. 90-170.)

9. Even if the bank were entitled to recover anything, the court erred in entering judgment in the sum of \$4244.36 for the following reasons:

*a.* There was a total failure of proof as to any damage whatsoever. (Tr. p. 170.)

*b.* In any event, the bond could not be held liable to both obligees for any greater sum than \$3375.00, with interest from date of demand, because this was the maximum amount which the bank claimed to have advanced in reliance upon the execution of the bond. (Tr. pp. 10-140-170.)



*c.* In any event, no interest could be charged against the surety prior to August 4, 1930, the date of the filing of the complaint in the state court (Tr. p. 10), since the bank failed to prove the date of demand, although invited by the court so to do (Tr. pp. 117-170), and the court, therefore, erred in entering judgment for such additional interest.

*d.* In any event, the bank was not entitled to recover against the bond in a sum in excess of \$2,000.00, for the reason that the maximum amount of the bond was \$4,000.00, and the bond ran to two obligees, one of whom (Twin Harbors Lumber Company) was not made a party to this action. (Tr. p. 171.)

### ARGUMENT

The foregoing assignments of error involve one principal question, i. e., is there any evidence to support the judgment? If this court concludes that there is none, then the judgment must be reversed and the assignments of error under Assignment No. IX, which relate to the amount of any judgment which should be entered if one is allowed, need not be considered. If, however, the record is deemed to be sufficient to support a recovery in some amount, then there will arise the additional questions (1) should such recovery be for the amount of the invoice or the amount of the

advance (2) should any interest have been allowed previous to the date upon which the complaint was filed, and (3) in any event, could there be a recovery in excess of one-half of the amount of the bond, since the bond ran to two several obligees, one of whom is not a party to this action, and therefore not bound by the judgment?

### I.

#### *There Is No Evidence to Support the Judgment*

Since the surety introduced no evidence there is no disputed question of fact in this case. The only question is one of law, i. e., is there any evidence to support the judgment, either in whole or in part? We shall consider this question first from the standpoint of the bond as written and without particular reference to the evidence. The bond first recites that the Wood Pipe Company as principal and the appellant as surety are bound unto "Twin Harbors Lumber Company of Aberdeen, Washington, and/or the National Bank of Tacoma, Tacoma, Washington, in the penal sum of \$4,000.00." Then follows the following recital:

"The condition of this obligation is such that, whereas, the said Principal has accepted a written order from the Twin Harbors Lumber Company of Aberdeen, Washington and/or The National

Bank of Tacoma, Tacoma, Washington, dated January 19th, 1929, for furnishing the following quantity of material:

50 M. B. M.  $1\frac{1}{2} \times 4$  8 Ft. S2S  $1\frac{1}{4} \times 3\frac{3}{4}$  Edges Rough at \$41.50 f. o. b. Tacoma.

50 M. B. M.  $1\frac{1}{2} \times 4$  9 Ft. S2S  $1\frac{1}{4} \times 3\frac{3}{4}$  Edges Rough at \$37.50 f. o. b. Tacoma, shipment to be made within sixty days, which order is by reference made a part hereof as fully to all intents and purposes as if set forth at length herein." (Tr. p. 16.)

These recitals definitely and conclusively establish two things: First, that the bond runs to two obligees, and second, that either both of them jointly or one of them had given to the Wood Pipe Company an order for the purchase of materials. These recitals are then followed by the conditions of the bond, which are as follows:

"Now, Therefore, if the said Principal shall supply the material in accordance with the written order, and if they will indemnify Twin Harbors Lumber Company of Aberdeen, Washington and/or The National Bank of Tacoma, Tacoma, Washington, against any direct, or, indirect damages that may be suffered or claimed for lack of delivery of material within the time called for; and further conditioned as required by law for the payment of all laborers, mechanics, sub-contractors and materialmen, and all persons who shall supply such person or persons or sub-contractors with provisions or supplies for the carrying on of such work, and all just debts, dues and demands incurred in the performance of the work,

then and in that event this obligation shall be void, but otherwise it shall remain in full force and effect." (Tr. p. 16.)

It will be observed that the conditions of the bond cover three possible contingencies: (1) That the obligees will be indemnified "against any direct or indirect damages that may be suffered or claimed for lack of delivery of material within the time called for"; (2) that all laborers, mechanics, etc., will be paid, and (3) that all just debts, dues and demands incurred in the performance of the work will be paid.

We understand that the bank makes no contention based upon 2 and 3 above, but rests its case entirely upon that portion of the bond by which it was indemnified against any damages occasioned by lack of delivery of material within the time specified.

In considering the effect of this language a few statements of the proper rule of construction to be applied might be noted:

"But the true rule for the construction of such contracts is that they ought to be interpreted like other classes of contracts according to the sense and meaning of the terms which the parties have used, and the terms ought to be taken, understood and given effect in their plain, ordinary and popular sense, fairly and justly to all parties to the contract." *New Amsterdam Casualty Co. vs. Central, etc., Fire Ins. Co.*, 4 F. (2nd) 203.



Likewise in *Kentucky Rock Asphalt Co. vs. Federal Casualty Co. of N. Y.*, 37 F. (2d) 279, it was held that a compensated surety is entitled to have a contract of plain meaning interpreted according to ordinary principles.

“The liability of a surety is measured by his contract, and, whether he is a gratuitous or compensated surety, which he is liable to the full extent thereof, such liability is strictly limited to that assumed by the terms, or, as the rule is otherwise stated, a surety is not held beyond the terms, or the strict, or the precise, or the clear, or the express terms of his contract; and the surety has the right to stand upon the strict, or precise, or the very terms of his contract; and to rely on the strict letter thereof. If the surety has indicated the manner in which the indebtedness for which he has undertaken to become liable shall be incurred, he is not liable for indebtedness incurred in another way.” 50 *Corpus Juris*, Sec. 126, pp. 71-73.

“It is urged by the lumber company that contract of a surety company is, under our statutes, an insurance contract, and should, therefore, be most strongly construed against the insurer. Granting this, a contract of insurance, like any other contract, must receive reasonable construction, and while insurance contracts are construed most favorable to the insured where the meaning of the language is doubtful, there is no application of this rule when the language has acquired by judicial construction a clear, definite meaning.” *U. S. F. & G. Co. v. Calif.-Arizona Construction Co.*, 186 Pac. l. c. 506.

“Contracts of suretyship should be interpreted like other classes of contracts, according to the sense and meaning of the terms which the parties have used, and those terms should be taken, understood and given effect in their plain, ordinary and popular sense, fairly and justly to all parties to the contract.” *U. S. F. & G. Co. v. Centropolis Bank*, 17 Fed. (2nd) 913, 53 A. L. R. 205.

A similar rule obtains in Washington, in which state this contract was executed.

“The rule is well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense.

An insurance company has the right to determine for itself whom it will insure and what interest it will insure, and to provide that any change in such interest without its consent will work a forfeiture of the policy. The policy before us provides in plain and unmistakable terms that any change in interest, title or possession of the subject-matter of insurance shall avoid the policy, unless otherwise provided by agreement endorsed thereon or added thereto.” *Jump v. North British, etc. Ins. Co.*, 44 Wash. 596, 87 Pac. 928.

“The principle the bonding company invokes is not based upon any rule of favoritism shown a surety. It admits that the contract is to be construed liberally. The rule of liberal construction, however, of a surety’s contract simply means that the contract shall be construed as contracts generally are construed when entered into between

parties standing on an equal footing and competent to contract; that is to say, according to its evident intent and purpose, without favoritism to either of the parties. It does not require the violation of any general principle otherwise applicable to contracts." *Puget Sound Bridge & Dredging Co. v. Jahn & Bressi*, 148 Wash. l. c. 53, 268 Pac. 169-175.

To this general rule of construction there should also be added the supplemental and explanatory rule that in the absence of fraud or mistake the parties to a bond are estopped from denying the recitals contained in the bond.

"If in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident, or mistake. There can of course be no estoppel as to matters not included in the contract." 21 *C. J.*, Sec. 111; page 1111.

"Estoppels by contract are of two kinds. (1) Estoppel to deny the truth of facts agreed upon and settled by the terms of the contract, and (2) estoppel arising from the acts done under or in performance of the contract." *Barton Savings & Trust Co. vs. Bickford*, 122 Atl. (Vt.) 582-585.

"For instance, when a contract is made, and the parties thereto, as a basis therefor, assume a certain state of facts to be true, they are thereafter estopped from denying the existence of such facts, so made the bases of the contract, and it is said that in this class of estoppels 'it can seldom

be an answer to the alleged estoppel, unlike the case of estoppel by conduct, that the party supposed to be estopped acted in ignorance of the facts or under a mistake'." *Bigelow on Estoppel*, (6th Ed. 495-6).

"We are of the opinion that the only contractual obligation assumed by the sureties is that set out in the recital of the bond, which recital is binding, not only on the defendants, but on the plaintiff." *Nazareth Foundry & M. Co. vs. Marshall M. & S. Co.*, 102 Atl. (Pa.) 268-270.

Applying these two rules it is submitted that the bond here sued upon not only contains no ambiguity such as to justify explanatory evidence, but that upon the contrary it definitely fixes the status of the bank as an obligee under the bond to be that of a vendee of materials from the Wood Pipe Company. The second paragraph clearly fixes the status of both obligees as such, because it recites the existence of a specific order and the exact terms of the order. If this recital be accepted, as we claim it must be, then there is no evidence to support the judgment. The proof of the bank was that in fact it gave no order to the Wood Pipe Company, and that its only connection with the transaction was that of a general creditor of the Pipe Company. Since the bond only protected it should it order material from the Wood Pipe Company, of course, without such an order it was not damaged by



the failure of the Pipe Company to manufacture the materials.

This is not an action for fraud or for mistake, because no fraud is claimed or reformation prayed for. It is a straight legal action upon a written contract, which contract is the bond. The bond indicates that the Pipe Company had a contract with some one party separately or with two parties jointly for the manufacture of certain wood products. To insure the faithful performance of this contract the bond was given, and there was but one contract, which was identified by the bond. We here distinguish between the contract and the bond by using the word "contract" to identify the alleged order given by the bank or the Twin Harbors Lumber Company, and the word "bond" to identify the document given for the protection of the parties involved in the contract. The only evidence of the existence of the contract is the recital in the bond and an invoice which was not made a part of the bond. There is no other evidence of any promise, written or implied, on the part of the second party, which ever it may have been. We, therefore, look to the bond to ascertain the identity of the second party to the contract therein referred to. Upon this there may be some ambiguity, because the bond designates the second party to the contract as the bank or the Twin Harbors

Lumber Company or both of them jointly. There were not two second parties since there was but one alleged order for materials. The bank by its pleading and proof disclaims the recitals in the bond that the bank was the second party to the contract. By the same token the bank established the indisputable fact that it had no claim against the surety on the bond. The bond, by its every word reasonably construed, shows that its entire purpose was to protect the second party to a contract to which the Wood Pipe Company was the first party. When it was established by the pleading and proof of the bank that the bank was not the party referred to in the bond as having a contract with the Pipe Company, any ambiguity in the bond created by the use of the words "and/or" was immediately removed, insofar as any right of the bank as a party to the contract or as a party to the bond is concerned, because the bond ran to the bank and/or Twin Harbors Lumber Company, whichever had the contract with the Wood Pipe Company.

The bond did not upon its face reveal which party had the contract with the Pipe Company, and it was not necessary or material that it do so. The surety cannot be charged with misleading the bank as to whether it had a contract with the Pipe Company,

because that fact was peculiarly within the knowledge of the bank.

To support this judgment the court must (1) reject the recital in the bond which definitely fixes the status of both obligees as vendees of goods to be manufactured by the Pipe Company, and (2) import into the bond an obligation of the surety in nowise expressed therein, either expressly or by necessary implication. This the pleadings and proof do not permit the court to do. The action was one upon the bond as written, and no fraud or mistake was alleged or reformation asked for. The document is plain as to the obligation of the surety. Since no legal reasons exist to require or even justify either reformation or construction, the action must fall under the bank's own proof.

Any considerable discussion of the evidence, therefore, becomes unnecessary, since it cannot be claimed that there is anything in the record which supports any judgment if our construction of the bond be adopted. The evidence does no more than to establish the fact that the bank was a creditor of the Pipe Company; that as collateral security for a loan, made possibly to cover an existing overdraft, it took an assignment of the proceeds of this order, and that the loan

has not been paid. Incidentally it might be observed that the Surety Company was not permitted to show by cross-examination of the President of the bank that this advance was made to cover an overdraft (Tr. p. 90), and also that the bank did not notify the Twin Harbors Lumber Company that this account had been assigned to it. (Tr. p. 92.) It would seem that this latter fact was a rather unusual practice if the transaction was what it purported to be upon the books of the bank. Be that as it may, however, we think all this evidence is entirely immaterial. It simply went to an independent collateral transaction which had no relationship to the obligation of this bond. For this reason it is unnecessary to specifically discuss the various particular assignments of error which relate to the introduction of this testimony.

We anticipate that the bank will make much of the decision of the State Supreme Court in the case of *National Bank of Tacoma vs. Aetna Casualty & Surety Company*, 161 Washington, 239, 296 Pac. 831, in which case a department of the Washington Supreme Court, with the Chief Justice dissenting, allowed a recovery upon a similar bond between the same parties, which was made at about the same time.

The Washington case, insofar as the ultimate result is concerned, is authority for the allowance of a



recovery upon this bond, but it is not a precedent for the legal conclusion reached by the court below, or for the recovery of anything in excess of the actual advance made. The complaint in the Washington case, as appears from Page 833 of the decision as reported in the Pacific Reporter, was drawn upon the same theory as is the complaint herein, and there, as here, judgment was prayed for the full invoice price. The complaint was not drawn upon the theory that it was an indemnity bond or that the advance was made for the purpose of providing funds to the Pipe Company to manufacture the goods described in the bond. Neither was any such argument made by the bank in its brief, a fact conceded by the state court in its opinion when it said (Page 833):

“The discussions by counsel for both parties go far afield in citing and discussing many texts and authorities not apposite to this case.”

The state court held (1) that the bond was an indemnity and not a surety bond, and (2) that the advance made by the bank was for the specific purpose of furnishing funds to the Pipe Company with which to execute this order. Based upon these two propositions recovery was allowed in the amount of the special advance, less a partial payment made by the Twin Harbors Lumber Company.

In the present case recovery was allowed for the full amount of the invoice, a conclusion necessarily inconsistent with that of the state court that the purpose of the bond was to protect loans of money put up to complete the contract. The Washington case, therefore, is not authority which supports this judgment, although if followed it could be made the basis of a judgment in favor of the bank in a different amount.

The reasoning of the Washington court is difficult to follow. Much importance is apparently attached to its conclusion that the bond is one of indemnity. Even if that be admitted we cannot understand its materiality. Whether we call it indemnity or something else the recovery under it would be the same, i. e., as stated in the bond. Neither can the terms of an indemnity bond be varied by parol evidence any more than any other written document.

As an academic proposition, however, it is submitted that this conclusion of the Washington court is erroneous. This conclusion is based upon the following quotations from 14 *R. C. L.* 44:

“There is an obvious and important difference between a contract of guaranty or suretyship and a contract of indemnity.” (Opinion p. 833.)

The writer of the opinion should have quoted the remainder of this paragraph in 14 *R. C. L.*, which is as follows:

“The former type of contract is a collateral undertaking and presupposes some contract or transaction to which it is collateral, while the latter is essentially an original contract.”

Reading this bond according to its ordinary meaning it cannot be doubted that it was an undertaking collateral to the principal contract described therein, and that the right to recover upon the bond depended entirely upon the performance or nonperformance of the principal contract of the Pipe Company. In the face of this recital in the bond, how can it be said that this was an original undertaking and not one collateral to the performance of another contract?

See also *Abrahamson vs. Burnett*, 157 Wash. 668-671, 290 Pac. 228, where this quotation was set forth in full.

In *Stearn on Suretyship* (3rd Ed.), Sec. 32, Page 37, it is said:

“The latter undertaking (indemnity contract) is an engagement to make good or save another from a loss upon some obligation which he has or is about to incur to a third party *and is not a promise made to one to whom another is answerable*. In other words, the promise is to the debtor and not to the creditor. There is no apparent dif-

ference in principle between a promise to a debtor to pay his obligation and a promise to indemnify him against it." (Italics ours.)

This bond was a promise made to one to whom another was answerable, i. e., it was a promise made to the lumber company and/or the bank to whom the Pipe Company was answerable. The promise was to the vendee and not to the vendor, because the Pipe Company was the vendor and to it no promise was made. How then can it be said that this is a bond of indemnity?

Likewise in Vol. I, *Brand on Suretyship* (3rd Ed.), Page 19, it is said:

"Contracts of suretyship and guaranty are both to be distinguished from contracts of indemnity. In a contract of indemnity, the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person or against loss resulting from such liability."

Where in the four corners of this bond is there anything whereby the surety agreed to indemnify the bank against liability to a third party or against loss resulting from such liability. Nowhere does the bond indicate that any liability to a third party was to be assumed by the bank.



See also 20 *Cyc.* 1402, and *Hall vs. Equitable Surety Company*, 191 S. W. 32.

The opinion of the Washington Court nowhere explains or disposes of the recital in the bond that an order had been given to the Pipe Company by the bank and/or the lumber company. Upon the contrary the Washington Court erroneously stated the conditions of the bond when it said (Opinion, Page 834):

“The surety company gave a bond, a condition of which is that, whereas, the principal has accepted a written order from the Twin Harbors Lumber Company, now if the pipe company will supply the material in accordance with the written order to indemnify the bank against any direct or indirect damages which may be suffered by a lack of delivery of material within the time specified, then the bond to be void.”

This is an erroneous statement of the conditions of the bond, because it disregards and omits the clause “and/or the bank.” The entire conclusion of the Washington Court, therefore, is based upon a construction of the bond which is opposed to its language, and hence the decision is not sound.

A few other inaccuracies in the opinion may be noted. For instance, upon Page 834 it is said:

“Obviously, however, appellant’s agents knew full well that the bank did not manufacture lumber and lumber products and that its principal

did. Without any evidence, they knew that the sole business of the bank was loaning money.”

If this conclusion had any substantial weight in the ultimate decision it certainly was erroneous. The bond recites that in this instance either the bank or the lumber company or both had purchased materials from the pipe company, an occupation different from the loaning of money. By its acceptance of the bond the bank acknowledged the correctness of this statement. Furthermore, as incidental to the loaning of money, banks may, and often do, engage in other transaction. For instance, the lumber company might have been a debtor of the bank and the bank might have held an assignment of the claim of the lumber company as collateral for the loan. If such a situation had existed the inclusion of the bank as a principal obligee would have been quite consistent and reasonable.

Again in its decision the Washington Court said (Opinion, Page 835):

“Thus for nonfulfillment of the order to the lumber company, the pipe company would be liable for damages measured by the difference between the value of the goods at the date of the breach of the bond and their value to the lumber company had they been constructed and delivered within the time agreed. This is uniformly settled by our own cases and by the courts of other states very generally.”

We submit that there is nothing in the bond or in the record which justifies the placing of these two obligees in two different classes. The language of the bond is identical as to both. Both of them by the same language are given the status of vendees of the Pipe Company, and both of them are protected against any damage sustained as the result of the non-delivery of the materials to them as such vendees. If the measure of damages as to the Pipe Company is as stated by the Washington Court, then where in the bond or in the record, is there any justification for the application of an altogether different and more favorable rule in behalf of the bank? To do so is to vary and contradict the terms of the bond, a subject which the decision of the Washington Court very carefully avoids.

It is submitted that the judgment should be reversed and the action ordered dismissed in its entirety.

## II.

### *In Any Event No Recovery Should Have Been Allowed in Excess of the Advance Made by the Bank*

If the court agrees with what has already been said, the judgment must be reversed and the remainder of this brief may be disregarded. In the event, however, that the court should conclude that a recov-

ery should be allowed, it is submitted that in no event could such recovery exceed the amount of the advance. The judgment of the court below allowed recovery in the amount of the invoice (\$3950.00), less seven per cent. for commissions and discounts, or \$3673.50, plus interest from the date of the receivership of the Pipe Company, or a total of \$4244.36. (Tr. pp. 112-114.) The actual advance made by the bank was \$3375.00. (Tr. p. 9.) The surety contends that recovery in the principal sum could not exceed this advance, irrespective of interest. Therefore, the judgment was in any event excessive in the sum of \$298.50, this being the difference between the amount allowed by the lower court and the actual advance. We think little argument is necessary on this point. The bank does not contend that it purchased the proceeds of this order from the Pipe Company. Upon the contrary, it took the note of the Pipe Company for \$3375.00 (Tr. p. 9), which was secured by an assignment of the proceeds of the order. (Tr. p. 14.) The only damage then which under any view it could be claimed that the bank sustained was occasioned by the failure of the Pipe Company to pay the note, which was \$3375.00, and not \$3673.50.

This was the conclusion reached by the State Court in the case of *National Bank of Tacoma vs. Aetna*



*Casualty & Surety Company, supra.* In that case the amount of the invoice, less deductions, was \$2730.00, for which amount the bank sued. The amount of the advance was \$2235.00. The sum of \$974.79 was paid upon the partial delivery of the order by the Pipe Company, and recovery was allowed for the unpaid balance of the advance, and not the unpaid balance of the invoice price. (Opinion, p. 834.)

We do not overlook the fact that in 1921, some eight years prior to this time, the Pipe Company executed and delivered to the bank a so-called general loan and collateral agreement. (Tr. p. 10.) The inability of the bank to collect and apply this excess of \$298.50 upon other general obligations of the Pipe Company, if any intent so to do ever existed, could by no stretch of the imagination be deemed a damage "for lack of delivery of material within the time called for." To so hold would be to inject into the transaction, as an item of damage, a wholly independent transaction. Moreover, the fact that here there was a specific note for \$3375.00, accompanied by an assignment of this account, would seem to remove the transaction from the scope of the general collateral agreement, which would of necessity limit the bank's loss to the advance actually made upon the security of the assignment. If this was not the intent of the

parties, then why was it necessary to take this note and specifically assign this account as collateral?

### III.

#### *Interest Should Not Have Been Allowed Prior to August 4, 1930*

The lower court allowed interest upon the invoice price, less deductions, from April 18, 1929, the date upon which a receiver was appointed for the Pipe Company. (Tr. pp. 59-115.) The complaint alleged that demand was made previous to suit, but did not set forth the date of such demand. (Tr. p. 39.) No evidence was offered upon this point, although this was called to the attention of counsel for the bank after the motion for a directed verdict by the bank had been granted. After the jury had been instructed to return a verdict for the bank, but before the verdict had been returned, counsel for the surety excepted to the instructed verdict — among other things: “Fourth, for the further reason that interest is not recoverable except from the date that demand was made upon the surety company, as held by the Supreme Court of this state.” (Tr. p. 117.) Thereupon the following occurred:

“THE COURT: The plaintiff did not show the date of demand, as I recall. Plaintiff asked to show when demand was made?

MR. METZGER: No, your Honor. I think we are entitled to interest as calculated." (Tr. p. 117.)

The record failing to show the date of demand, it is submitted that interest should not have been charged for any period prior to August 4, 1930, the date when the complaint was filed in the state court. (Tr. p. 14.)

While there is some conflict of authority in other jurisdictions concerning the question of when interest begins to run, the Washington Court in *National Bank of Tacoma vs. Aetna Casualty & Surety Company*, *supra*, announced the rule which we contend for in the following language (Opinion, p. 835):

"As a necessary part of his damages, an indemnitee may also recover against his indemnitor interest after due notice to the indemnitor of the loss and damage."

In *Illinois Surety Company vs. John Davis Co.*, 244 U. S. 376; 61 Law Ed. 1206, it was said:

"The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must, therefore, be determined by the law of that state."

The rule announced by the Washington Court must, therefore, be applied herein.

This rule is in accord with the following decisions of the Federal Court:

*In re Perelstine*, 44 Fed. (2nd Ed.) 1019;

*Black Diamond SS. Corporation vs. Fidelity & Deposit Co. of Maryland*, 33 Fed. (2nd Ed.) 767.

#### IV.

*The Judgment Should in No Event Have Been for More Than One-Half of the Penalty of the Bond with Interest*

This bond is in the penal sum of \$4,000.00. (Tr. p. 15.) It runs to two obligees, one of whom is not a party to this action. Upon its face it may be either joint or several. It cannot be both. As was said in 9 *Corpus Juris* 38:

“A bond given to two or more obligees may be given to them jointly or severally, but not jointly and severally.”

See also:

*Title Guaranty & Surety Co. vs. Foster*, 203 Pac. 231 (Okla.).

The proof shows that this bond was not a joint obligation because the bank by its pleading and proof established the fact that it did not have any contract with the Pipe Company either by itself or jointly with the lumber company, and further established the fact that the lumber company was in no way connected with the transactions upon which a recovery was allowed. The bond then was a several obligation running



to the Lumber Company and the bank. The lumber company was not a party to the action, and is not bound by the judgment. Consequently, one-half of the amount of the penalty of the bond should be reserved to protect what, if any, rights the lumber company may have arising out of any separate transaction with the Pipe Company.

Substantially all of the authorities upon this are referred to and discussed in *Title Guaranty & Surety Co. vs. Foster*, 203 Pac. 231. That case involved a guardian's bond given to cover the accounts of five wards. In an action in behalf of one of the wards, to which action the others were not made parties, it was held that the recovery could not exceed one-fifth of the penal sum of the bond.

This decision was subsequently reaffirmed by the same court in *Southern Surety Co. vs. Williams*, 231 Pac. 293.

Likewise the same rule has been followed in Iowa and Wyoming.

*Hooks vs. Evans*, 68 Iowa 54; 25 N. W. 925-926;

*U. S. Fidelity & Guaranty Co. vs. Parker*, 121 Pac. 531; 124 Pac. 269.

We anticipate that these cases may be attempted to be distinguished by reason of the fact that in this

case one M. H. Williams, office manager of the lumber company, and one Tully Stallard, an auditor for the same company, testified that the lumber company had never given the order referred to in the bond. (Tr. pp. 101 to 113.)

This testimony we submit does not change the situation. The admissions of these employees of the lumber company, which is a corporation, cannot bind that corporation as a matter of law, since the corporation is not made a party to the action. As was said by the Iowa court in *Hook vs. Evans, supra* (p. 926), "The other three wards were not made parties, and without them no judgment can be rendered by which their rights can be impaired."

Furthermore, those admissions go no further than to negative the existence of any liability to the lumber company as a vendee of materials to be manufactured. The language of the bond is identical as to both the lumber company and the bank. If the bank is entitled to recover as a creditor of the Pipe Company, by the same token the lumber company could likewise recover upon a similar state of facts. Neither of these witnesses testified to anything except the nonexistence

of the order referred to in the bond. It is therefore submitted that recovery could in no event exceed one-half the penalty of the bond, which is \$2000.00, plus interest.

Respectfully submitted,

J. SPEED SMITH and HENRY ELLIOTT, JR.  
HENDERSON, CARNAHAN AND THOMPSON,

*Attorneys for Appellant.*

No. 6789

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IN THE  
**United States Circuit Court  
of Appeals**

FOR THE NINTH CIRCUIT 8

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THE AETNA CASUALTY & SURETY  
COMPANY, a corporation,

*Appellant,*

vs.

THE NATIONAL BANK OF TACOMA,  
a National Banking Associa-  
tion,

*Appellee.*

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Upon Appeal from the United States District  
Court for the Western District of Wash-  
ington, Southern Division

**Brief of Appellee**

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**FILED**

**MAY 23 1932**

**PAUL P. O'BRIEN,**  
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IN THE  
**United States Circuit Court**  
**of Appeals**

FOR THE NINTH CIRCUIT

---

THE AETNA CASUALTY & SURETY  
COMPANY, a corporation,

*Appellant,*

VS.

THE NATIONAL BANK OF TACOMA,  
a National Banking Association,

*Appellee.*

---

Upon Appeal from the United States District  
Court for the Western District of Wash-  
ington, Southern Division

---

**Brief of Appellee**

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STATEMENT OF THE CASE

For many years the appellee Bank had been advancing moneys to the American Wood Pipe Company, hereinafter referred to as the "Pipe Company," to finance its operations in the manufacture and sale of wood pipe and other similar products. (Tr. p. 70.) Many of the loans so made

were secured by assigning to the Bank invoices covering products manufactured and sold by the Pipe Company, which invoices were accompanied by bills of lading showing shipment of such products according to the terms of the invoices. (Tr. p. 73.) In the fall of 1928 Mr. Morrill, President of the Pipe Company, came to Mr. Mattison, then Vice President of the Bank, and stated that the Pipe Company was in financial difficulties so that unless they could secure advances prior to the time their products were made up and delivered to the carriers, they would be unable to finance the filling of existing orders or to take on other orders or even to continue in business. Mr. Morrill therefore requested the Bank to make advances against proceeds of orders taken but as yet unfilled. This the Bank wholly declined to do but suggested that it might consider making advances against the proceeds of such orders if it could be supplied with a bond of the Pipe Company and a satisfactory surety company guaranteeing to it (1) that there was in fact a valid and enforceable order as represented by the Pipe Company, and (2) undertaking to indemnify the Bank against any loss which it might sustain by reason of the failure to perform and fulfill such order. Mr. Morrill was positive that he could obtain bonds of that character and to the effect required and undertook to do so, and accordingly arranged with the appellant Surety Company for such bonds. (Tr. pp. 74-77, 78-80.)

Pursuant to this arrangement the Pipe Company from time to time thereafter applied to the Bank for advances against the proceeds of what were represented to be accepted, written orders, tendering to the Bank as the basis of each loan or advance so applied for an assignment of the proceeds of an order for certain wood products to be manufactured by the Pipe Company, together with the undertaking of the Pipe Company and the appellant Surety Company in the form of a bond that the Pipe Company had accepted a written order corresponding to that covered by the assignment tendered and that *such order would be fulfilled and completed according to its terms*, and further that *the Bank would be indemnified against any loss by reason of the Pipe Company's failure to carry out and complete such order*. The Bank from time to time thereafter, as such assignments and bonds were tendered to it, made advances, taking the Pipe Company's note to evidence the amount of each advance so made, but in each instance relying upon the undertakings of the Pipe Company and the appellant Surety Company in the bond contemporaneously furnished for the existence, enforceability, and performance of the order recited in the bond.

The occasion for such bonds, the particular circumstances under which that involved in this action was executed and delivered, the purpose for which the bonds were obtained by the Pipe Com-



pany, the use made of them, as well as the reliance put thereon by the Bank, were all known to the Surety Company prior to and at the time it executed said bond. (Tr. pp. 69-70. Offer of Proof, Tr. pp. 95-99.)

So far we have stated the underlying facts and circumstances in general terms. Coming to the particulars of the case on appeal, we have this situation: On January 21, 1929, the Pipe Company was indebted to the Bank on account of advances made against assigned accounts in the aggregate sum \$157,609.61, and on direct loans totaling \$20,000.00. (Tr. p. 94.) The Bank held the so-called general loan and collateral agreement of the Pipe Company. (Ex. "A", Tr. p. 10. Tr. pp. 71 and 132.) By the terms of that agreement "all moneys, chattels, negotiable instruments, securities, bills of lading, warehouse receipts, paper credits, demands, choses in action, rights and property of every kind, tangible or intangible, at any time in possession or control of said Bank \* \* \* belonging to, for account or subject to the order" of the Pipe Company were assigned to and held by the Bank as security "for any and all indebtedness, obligation or liability of the undersigned (the Pipe Company) to said Bank, nor or hereafter existing, matured or not matured, absolute or contingent \* \* \*." On said date in accordance with the general practice theretofore established as hereinbefore outlined, the Pipe Company made applica-

tion for a further advance of \$3375.00 based on (a) an assignment to the Bank of the proceeds of an allegedly existing and accepted but wholly unfilled order from Twin Harbors Lumber Company of Aberdeen, Washington (Ex. "B", Tr. pp. 14 and 133), and (b) a bond of indemnity from the Pipe Company as principal and appellant as surety in the penal sum of \$4000.00. The bond, after reciting that the Pipe Company had accepted a written order "from the Twin Harbors Lumber Company of Aberdeen, Washington, and/or The National Bank of Tacoma, Tacoma, Washington, dated January 19, 1929, for furnishing the following quantity of material:" (here followed specification of the quantity, size, and price of the material) "shipment to be made within sixty days, *which order is by reference made a part hereof as fully to all intents and purposes as if set forth at length herein,*" (italics ours), was conditioned as follows:

"Now, therefore, if the said principal shall supply the material in accordance with the written order and if they will indemnify Twin Harbors Lumber Company of Aberdeen, Washington, and/or The National Bank of Tacoma, Washington, against any direct or indirect damages that may be suffered or claimed for lack of delivery of material within the time called for; \* \* \* then and in that event this obligation shall be void but otherwise it shall

remain in full force and effect." (Ex. "C", Tr. pp. 15-17, 117-118.)

The advance was made and to evidence the same the Pipe Company executed and delivered to the Bank in addition to documents (a) and (b) above its so-called assignment note for \$3375.00. (Ex. "D", Tr. pp. 9-10, pp. 133 and 86.) The amount of the advance was deposited to the credit of the Pipe Company in its open or checking account with the Bank. (Ex. 23 and 21, Tr. pp. 136 and 140.) The expectation of the Bank was that if the asserted order with Twin Harbors Lumber Company had been filled, it would have received the entire proceeds of the assigned account (Tr. p. 88), which would have netted \$3677.45 had there been such an order and had it been filled according to its terms. (Tr. p. 112.) Such proceeds would have repaid the particular advance and left a substantial margin for application under the general loan and collateral agreement upon the other indebtedness of the Pipe Company.

The order was not filled by the Pipe Company prior to April 19, 1929, when it went into receiver's hands nor by the receiver thereafter. (Tr. p. 88.) The Bank received nothing from the Pipe Company, its receiver, or the Twin Harbors Lumber Company on account of this transaction. The receiver of the Pipe Company found no such order in the records of that company (Tr. p. 113) and in fact

no such order was ever placed by the Lumber Company with the Pipe Company. (Tr. pp. 105 and 112.)

The Twin Harbors Lumber Company, which was a solvent, going concern throughout 1929 and up to the date of the trial (Tr. pp. 108 and 113), was never furnished with the bond here sued on, did not know of its existence, and neither made nor had any claim against such bond (Tr. pp. 106 and 107).

At the time of the trial the unpaid direct loans of the Pipe Company to the Bank amounted to \$17,090.45 and the unpaid assigned accounts to \$82,434.42. (Tr. p. 94, Ex. 25, Tr. p. 165, Ex. 24, p. 160.)

It should also be noted that the Bank had nothing to do with procuring the bond from the Surety Company, did not apply to the Surety Company for the Bond, nor furnish the Surety Company with any information upon which it was written. On the contrary, the bond was written by the agent of the Surety Company at the request of the Pipe Company. The usual practice was for Mr. Morrill, President of the Pipe Company, or someone in his office, either in person or by phone to notify the Surety Company that he had a contract and desired a bond, whereupon the bond and the application therefor was made up by the Surety Company and handed to Mr. Morrill when called for by him.



Mr. Caesar, agent and attorney in fact for the Surety Company, testified:

“The data on which the recital in the bond was made was information supplied by Mr. Morrill or by his office, either oral or over the telephone, and the effect of it was that he had some kind of a contract to furnish material to somebody. \* \* \* We wrote that bond based on the information that he furnished in that way. Certainly I knew The National Bank of Tacoma was not in the business of dealing in lumber. \* \* \* After they (the bonds) were executed, Mr. Morrill took them. I do not know what he did with them positively. I did not see him but I think he took them to The National Bank of Tacoma, I am not sure. Before I executed any of these bonds I presumed they would be taken to (by) Mr. Morrill to The National Bank of Tacoma. I did not know it as a positive certainty. *I executed them with the idea and the understanding that is where they would come.*” (Tr. pp. 63 and 64.)

Upon this state of facts appellee contends:

I. That the bond sued on is an original, independent undertaking of the principal and the surety to it and therefore constitutes a contract or bond of indemnity.

II. That parol evidence was not only proper

but essential to establish the intent of the parties with respect to the bond and hence the nature or character of the bond itself.

III. That bonds of a compensated surety prepared by its agents are to be construed strictly against the surety and liberally in favor of the obligee and that parol evidence is admissible to ascertain the intention of the parties as to the purpose and scope of the bond.

IV. That in the particular circumstances the Bank was in fact the sole obligee under the bond, but if not, then, since the bond was intended and is to be construed as one of indemnity, its obligation is not joint but several and the Bank is entitled to recover its particular damages.

V. That the Surety Company is estopped by the recitals in the bond to claim either that there was no order for the material as recited or that that order was placed by any other than the Twin Harbors Lumber Company, but that there is no estoppel operating against the Bank.

VI. That accordingly the Bank is entitled to recover on the bond what it would have received had the alleged order been filled according to its terms but not exceeding the penal sum of the bond with interest thereon.

## POINTS AND AUTHORITIES

## I.

*The bond is an original contract or undertaking of indemnity.*

It was so held by the Supreme Court of Washington in *The National Bank of Tacoma vs. Aetna Casualty and Surety Company*, 161 Wash. 239, 296 Pac. 831.

It is a bond of indemnity by its terms and by definition.

“The use of the word ‘indemnity’ shows the object and nature of the contract. It was to reimburse or make whole the assured against loss on account of such liability.”

*Frye vs. Bath Gas & Electric Co.*, 54 Atl. 395 at 396.

“As relating to the contract of indemnity it (the word ‘indemnity’) may be more specifically defined as the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.”

“The promise in an indemnity contract is an original and not a collateral undertaking and in this respect differs from a guaranty. If the contract of indemnity refers to and is found-

ed upon another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising upon such other contract. It is not a contract to answer for the contractual debt, default or miscarriage of another than the promisee, but a contract to indemnify the promisee from loss owing to his contractual liability. It is given to a person against his sustaining loss or damage."

31 *C. J., Indemnity*, p. 419.

"A definition of 'indemnity' as an obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit, though somewhat narrower than the broad definition given above is often quoted. By a contract of indemnity one may agree to save another from a legal consequence of the conduct of one of the parties or of some other person."

14 *R. C. L., Indemnity*, p. 43.

"There are many contracts of indemnity that have no reference to the indemnitee's covenants contained in some other contract, but are entered into to indemnify the promisee against losses from something other than his contractual liabilities, thus there can be a contract indemnifying the promisee against loss growing



out of an act or failure to act, such as a contract to indemnify one for loss that may grow out of a third party's failure to perform a contract."

*Eckhart vs. Heier*, 158 N. W., 403 at 404.

See also:

*Reed vs. Holcomb*, 31 Conn., 360;

*Smith vs. Delaney*, 29 Atl., 496;

*Wolthausen vs. Trimpert*, 105 Atl. 687,  
Conn.

It is established as an indemnity bond by the circumstances of its execution.

"The character of the bond is determined by its terms and the circumstances of its execution. *Miles vs. Baley*, 170 Calif. 151, 149 Pac. 48; *United, etc., Co. vs. Poetker*, 180 Ind. 255, 102 N. E. 372, *L. R. A.* 1917-B 984."

*Fid. & Dep. Co. vs. Duke*, 293 Fed. 661 at 663 (C. C. A. 9th Circuit).

"The correct rule is to give more weight to the general purpose of the bond, as indicated by all of its provisions, and the interests of the parties in the subject matter, than the precise form of words used in a particular clause; or, as said in *Evans vs. United States Fid. & Guar. Co.*, 195 Mo. 438, 192 S. W. 112, in speaking of the bond of a compensated surety: 'The bond is

to be construed in the same way as any other contract, that is, with regard to the intention of the parties and the purpose of the bond, as disclosed by the instrument, read in the light of the surrounding circumstances.' ”

*Warren vs. National Surety Co.*, 149 Wash.  
378 at 382 and 383.

See also:

*American Bonding Co. vs. Pueblo Inv. Co.*,  
150 Fed. 17 at p. 27 et seq. (C. C. A. 8th  
Circuit).

## II.

*The character of the bond being determined by the circumstances of its execution, parol evidence is not only proper but essential, not only to show such circumstances, the intentions of the parties to it, and the purpose for which given, but also to resolve the ambiguities inherent in its language.*

“In order correctly to ascertain the intentions of the parties to a deed, contract or other instrument of writing and properly to interpret the same, it is competent to inquire into the purpose for which the writing was executed and to this end parol evidence is admissible.”

22 C. J., *Evidence*, Sec. 1586, p. 1184.

“Parol evidence is admissible to show the

situation of the parties and the circumstances under which a written instrument was executed for the purpose of ascertaining the intentions of the parties and properly construing the writing.”

22 C. J., *Evidence*, Sec. 1590, p. 1186.

“Like all other contracts the undertakings of a surety must be construed fairly and reasonably according to the intention of the parties. If the surety has used ambiguous language and the party secured has advanced his money on the faith of the interpretation most favorable to his rights, that will ordinarily prevail if the instrument is open reasonably to such interpretation.”

*Smith vs. Molleson*, 42 N. E. 669, at p. 670.

“A contract of suretyship is to be construed in accordance with the same rule that applies to the interpretation of any other written instrument. The limitation of liability is not upon the interpretation, but in the application of the contract after the interpretation, \* \* \*. *Smith vs. Molleson*, 148 N. Y. 241, 42 N. E. 669. If there be ambiguity in the contract it is construed in favor of the person who has accepted it and expects to take benefit under it. *Gambol vs. Cuneo*, 21 App. Div. 413, 47 N. Y. 548. Affirmed in 162 N. Y. 634, 57 N. E. 1110. In

arriving at the correct construction of such a contract it is always permissible to take into consideration the circumstances and surroundings of the parties at the time when the contract was made and such construction will be given to it as will carry out the evident intent of the parties to the instrument."

*Sachs vs. American Surety Co.*, 76 N. Y. S.  
at p. 337.

"The one purpose of all construction and interpretation is to ascertain the intent actuating the parties to the agreement if that end can be accomplished consistently with the rules of evidence. It may often appear (and does quite readily appear in the instant case) that to ascertain the real scope and effect of the bond necessitates reference to the facts and circumstances of the entire transaction to which it was a part. As said by this court in *Jacobs vs. Jacobs*, 42 Iowa 605: 'The whole contract must be considered in determining the meaning of any of its parts. The first point is to ascertain what the parties meant, and then to put such construction upon their contract as will bring it as near to their actual meaning as the words they saw fit to employ, when properly construed, \* \* \* will permit. In arriving at this meaning the subject matter of the contract, the situation of the parties and of the property, and



the purpose of the parties in making the contract must be considered.' \* \* \* The objects which the parties had in view in inducing the contract are also to be considered in its construction. \* \* \* As the actions of men are usually the index of their intentions it is obvious that their acts may be proved, in connection with their contracts, in order to arrive at their true intention in regard to the obligations they assume and accept from others."

*U. S. F. & G. Co. vs. Iowa Tel. Co.*, 156 N. W. at p. 730. Quoted with approval in the above form in *Aetna Casualty & Surety Co. vs. State*, 298 S. W. at p. 504.

"It will be conducive to brevity and perspicuity to obtain a clear idea of the relations of the parties to the agreement to be considered, their respective covenants therein and the moving considerations which induced them to make their stipulations before entering upon the discussion of this issue. This conception must be secured by the light of the fundamental rule that the situation of the parties when the contract was made, its subject matter and the purpose of its execution are material to determine the intention of the parties and the meaning of the terms they used, and when these are ascertained they must prevail over the dry words of the stipulations."

*Kauffman vs. Raeder*, 108 Fed. 171 at 175,  
per Sanborn J.

“The ascertainment of the true intention is the great rule for the construction of contracts and the favor with which the law regards a surety does not make his undertakings an exception.”

*Bordt vs. McCutcheon*, 157 Fed. at 184, per  
Hook J.

“In case of ambiguity or doubtful construction the bond should be construed in the light of the circumstances surrounding the execution thereof, the object to be accomplished, the situation of the parties, and the relations existing between them.”

9 C. J., *Bonds*, p. 33.

“As has been seen obligees as a matter of law cannot be entitled jointly and severally. It is necessary therefore to determine where there are several obligees whether their rights are joint or whether they are several \* \* \* but it is now well established that \* \* \* ‘If there be words capable of two constructions we must look to the interest of the parties which they intend to protect and construe the words according to their interest.’ This rule is not very easy to apply, though its validity may be regarded as established.”

*Williston on Contracts*, 1920 Ed., Vol. I,  
Section 325, p. 612.

See also:

*Davis vs. Patrick*, 141 U. S. 479, 35 L. Ed.  
826;

*Aetna Casualty & Surety Co. vs. State*, 298  
S. W. 501;

*Reed vs. Holcomb*, 31 Conn. 360;

*Wolthausen vs. Trimpert*, 105 Atl. 687;

*Zalkin vs. Sunshine Sales Corporation*, 231  
N. Y. S. 571.

The terms of the bond that the principal and surety "are held and firmly bound unto Twin Harbors Lumber Company of Aberdeen, Washington, and/or The National Bank of Tacoma, Tacoma, Washington," as well as the recital that "the said principal has accepted a written order from the Twin Harbors Lumber Company of Aberdeen, Washington, and/or The National Bank of Tacoma, Tacoma, Washington," are ambiguous and uncertain in their import. This is admitted by appellant. (Appellant's brief, pp. 14 and 21.) The recital does not assert that the order was given by the Bank or that it was given by the Lumber Company or by both. It only says that the order was given by one or by the other or by both. Parol evidence is therefore essential to show what the

fact was and neither such fact nor the evidence established thereby conflict in the slightest degree with the recitation. Until the fact is determined, which can only be by parol evidence, the purpose and intent underlying the giving and acceptance of the bond and hence the true construction to be placed thereon cannot be ascertained.

“The expression *and/or* is quite frequently used in contracts \* \* \*. When used in a contract, the intention is that the one word or the other may be taken accordingly as the one or the other will best effect the purpose of the parties as gathered from the contract taken as a whole. In other words such an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such interpretation as will best accord with the equity of the situation, and for that purpose to use either ‘and’ or ‘or’ and be held down to neither.”

*State vs. Dudley*, 106 So. 364 at 365.

See also:

*Cuthbert vs. Cumming*, 10 Exch. 809 at 814.

The reference to the order in the concluding clause of the recital in the bond put the surety on inquiry and charged it with notice of what that inquiry would have disclosed, and therefore entitled the Bank to show by parol what the inquiry would



have disclosed, namely, that the order referred to purported to be solely between the Pipe Company and the Lumber Company.

*Nazareth Foundry & Machine Co. vs. Marshall Machinery & Supply Co.*, 102 Atl. 268 at 270.

### III.

*Bonds of compensated sureties are construed strictly against the surety and liberally in favor of the obligee or beneficiary.*

“A contract in which a corporation or person for profit had undertaken to insure the obligee against a failure of performance on the part of the principal obligor should be liberally construed, and not according to the rule of strictissimi juris. *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *Illinois Surety Co. vs. John Davis Co., et al.*, 244 U. S. 376, 37 Sup. Ct. 614, L. ed. 1206; *Brogan vs. National Surety Co.*, 246 U. S. 257, 38 Sup. Ct. 250, 62 L. ed. 703, L. R. A. 1918-D, 776.”

*U. S. vs. George F. Pawling & Co.*, 297 Fed. 65 at 68.

“In dealing with the bonds of a compensated surety, they are to be most strictly construed against the surety, and where the terms of such

a bond are susceptible of more than one construction the court will adopt that construction most consistent with the purpose to be accomplished, which would be the construction most favorable to the beneficiary. *Stearn's Suretyship* (3d Ed.), p. 404; *Southern Surety Co. vs. Kinney*, 74 Ind. App. 205, 127 N. E. 575; *Northern Pacific R. Co. vs. Fidelity & Dep. Co.*, 74 Wash. 543, 134 Pac. 498; *Costello vs. Bridges*, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915-A 853."

*Duke vs. Nat. Surety Co.*, 130 Wash. 276 at 279, affirmed in 131 Wash. 700.

"Elementary rules of construction of indemnity contracts of this nature prepared by the indemnitor in stereotyped form, as this contract manifestly was prepared by the insurance company, call for a construction most strictly against the indemnitor."

*Stusser vs. Mutual Union Ins. Co.*, 127 Wash. 449 at 455.

"In the interpretation of indemnity contracts, the cardinal rule is that which applies to contracts generally, i. e., to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Contracts of indemnity, therefore, must receive a reasonable construction so

as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design; nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms. Where the general import of a contract is one of indemnity, it is the rule that all of the words used therein should be construed to be in harmony with, and subservient to, the general purpose of the bond. When applied, however, this rule should be in aid of the intention of the parties and should not be employed to defeat their purpose. Hence if a bond contains both a covenant to indemnify against loss and a covenant guaranteeing the performance of a specific thing, the latter covenant will not be subordinated to the former, but both will be given their full effect, and accordingly a failure to do the thing specified will constitute a breach of the bond, on the happening of which a cause of action will arise."

14 *R. C. L., Indemnity*, 46.

See also:

*National Surety Co. vs. Campbell*, 108 Wash.  
596, 185 Pac. 602;

*German-Am. Bank vs. Illinois Surety Co.*,  
99 Wash. 9; 168 Pac. 772;

6 R. C. L., *Contracts*, p. 854.

The rule applies with all vigor where a bond is prepared by the surety company, and in such case all ambiguities are to be resolved against the surety company.

“If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the surety company.”

*American Surety Co. vs. Pauly*, 170 U. S.  
133, at 144, 42 L. Ed. 977, at 981.

“Where a policy of insurance is so framed as to leave room for two constructions the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company’s attorneys, officers or agents prepared the policy and it is its language that must be interpreted.”



*Liverpool, etc., Ins. Co. vs. Kearney*, 180 U. S. 132, at 136, 45 ~~X~~ Ed. 460, at 462.

“It is undisputed that appellant is a paid surety and therefore it is not a favorite of the law as is a non-compensated or accommodation surety, that its contract is to be construed rather as an indemnity insurance than a suretyship, and that where there is an ambiguity the construction will be adopted most favorable to the person intended to be protected.”

*Hartford Accident & Indemnity Co. vs. State*, 159 N. E., 21, at 25.

See also:

*Maryland Casualty Co. vs. Bank of England*, 2 Fed. (2d) 793 (C. C. A. 8) ;

*New Amsterdam Cas. Co. vs. Central Nat. Ins. Co.*, 4 Fed. (2d) 203, at 207.

The bond here is to be construed according to these rules.

*National Bank of Tacoma vs. Aetna Cas. & Sur. Co.*, 161 Wash. 239, at 249.

#### IV.

(a) *The appellee Bank is in fact the sole obligee under the bond, but if not, (b), the obligation of the bond is several and the appellee is entitled to recover its particular damage.*

(a) This rests on parol evidence of the situation of the parties and the circumstances under which the bond was written, the propriety and competency of such evidence being governed by authorities heretofore cited.

There was no delivery of the bond to Twin Harbors Lumber Company, either actual or constructive, and none was intended. Delivery of a bond is essential to its validity.

9 *C. J. Bonds*, Section 24, page 16;

4 *R. C. L. Bonds*, Section 5, page 48.

(b) That the bond's obligation is several was held in *The National Bank of Tacoma vs. Aetna Casualty & Surety Co.*, 161 Wash. 239, 296 Pac. 831.

"A bond given to two or more obligees may be given to them jointly or severally but not jointly and severally. The general rule is that if the interest of the obligees is joint, the bond will be deemed to have been given to them jointly; if their interests are several, then severally." 9 *C. J., Bonds*, pp. 38 and 39.

"Where the legal interests and cause of action of the obligees is several and not joint, the covenant is taken to be several and each of the obligees may bring an action for his particular damages."

4 R. C. L., *Bonds*, Sec. 31, p. 65.

See also:

*Title Guaranty & Surety Co. vs. Foster*, 203  
Pac. 231 at 238 et seq;

*Williston on Contracts*, 1920 Ed. Vol. I, Sec.  
325, p. 612;

*Atlantic, etc., Rwy. Co. vs. Thomas*, 53 So.  
510;

*Harrington vs. Gordon*, 42 Wash. 692;

*Beckwith vs. Talbot*, 95 U. S. 289, 24 L. ed.  
496;

*Anderson vs. Nichols*, 107 Atl. 116;

*Emmeluth vs. Home Benefit Assn.*, 25 N.  
E. 235;

*Dashley vs. Daniel*, 202 Fed. 427, (C. C. A.  
9th).

## V.

*Appellant Surety Company is estopped by the recitals in its bond to deny that there was an accepted, written order of the purport set out, given either by the Lumber Company or by the Bank or by both.*

“The material recitals in a bond estop both principal and sureties \* \* \* as effectively

as material recitals in a deed estop the parties thereto."

21 *C. J.*, *Estoppel*, Sec. 84, p. 1096, and numerous cases there cited.

## VI.

*There is no estoppel against appellee.*

The bond in question is a sealed instrument to which the Bank is not a party and to which its seal is not affixed. As to it the bond is in effect a deed poll. There is no estoppel against the grantee in a deed poll.

*Robertson vs. Pickerel*, 109 U. S. 608 at 614 and 616, 27 L. ed. 1049 at 1051 and 1052.

The recitals are wanting in the necessary certainty to work an estoppel against the Bank.

"A recital that does not amount to a precise affirmation of a fact will not estop the party to deny the fact."

21 *C. J.*, p. 1112.

"In order to create an estoppel the instrument by which the estoppel is claimed must be precise and certain and the intention clear and unambiguous. \* \* \* An estoppel cannot be extended beyond the exact terms of the admis-



sion so as to preclude a party from establishing facts not inconsistent therewith."

21 *C. J.*, *Estoppel*, p. 1102.

"To found an estoppel the recital must be certain. With this idea in mind recitals have been classified as being either general or particular. General recitals are such as do not definitely affirm or deny the existence of some fact or either expressly or impliedly show a clear intention of the parties that either one or the other or both of them shall be concluded from disputing the fact recited. These do not work an estoppel as to the fact in question."

21 *C. J.*, *Estoppel*, p. 1090.

"An estoppel says Coke, because it concludeth a man to allege the truth must be certain to every intent and not to be taken by argument or inference. *Coke on Litt.*, 352 B. It should be certain to every intent and therefore if the things be not directly or precisely alleged or be a mere matter of supposal, it shall not be an estoppel. *Wright vs. Bucknell*, 2 Barn. & Ad. 278. To work an estoppel a recital should clearly affirm or deny some present or past fact or admit some liability definitely stated."

*Calkins vs. Copeley*, 29 Minn. 471 at 473.

"But before an admission (contained in a

recital) can have that effect (i. e., to create an estoppel) it must be so broad and certain as to admit of no other construction. Courts are not permitted to indulge in suppositions or to draw inferences from the language employed in such cases."

*Zimler vs. San Louis Water Co.*, 57 Cal. 221 at 223.

See also:

*Bigelow on Estoppel*, 6th Ed., pp. 398 and 399;

*Jackson vs. Allen*, 120 Mass. 64 at 79;

*Wright vs. Bucknell*, 2 Barn. & Ad. 278, 22 E. C. L. 122.

There is no basis for an "estoppel in pais" against the Bank.

The plaintiff Bank made no admission or statement to the Surety Company to procure the issuance of this bond, the Surety Company in issuing and writing the bond did not act on anything that the Bank or any of its officers said or did, relied upon no representations or actions of the Bank, and has been in no manner injured by anything which the Bank has done.

"To constitute an 'estoppel in pais' there must concur an admission, statement, or act

inconsistent with the claim afterward asserted, action by the other party thereon and injury to such other party.”

21 *C. J. Estoppel*, 1119.

## VII.

*Appellant having rested upon its motion for a directed verdict, it is concluded by the court's direction of a verdict in favor of appellee, there being substantial evidence to sustain that verdict.*

“The established rule is, ‘Where both request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn therefrom,’ and upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it.”

*Williams vs. Vreeland*, 250 U. S. 295, 63 L. ed. 980, 3 A. L. R. 1038 at 1040.

“The effect of this (that both sides moved for a directed verdict) was to waive a jury trial and submit all questions of fact as well as of law to the judge. He has found in favor of the plaintiff and we are powerless to review his findings unless satisfied after viewing the evi-

dence in the light most favorable to plaintiff and resolving all controverted questions in his favor that there was no evidence upon which the finding can be sustained; in other words, unless we think that upon the evidence a verdict should be directed for the defendant as a matter of law.”

*Swift & Co. vs. Columbia Ry. Gas & Electric Co.*, 17 Fed. (2d) 46 at 49 (C. C. A. 4th Circuit).

See also:

*Beuttell vs. Magone*, 157 U. S. 154, 39 L. ed. 654;

*Sena vs. American Turquoise Co.*, 220 U. S. 497, 501, 55 L. ed. 559;

*Lawton vs. Carpenter*, 195 Fed. 362 (C. C. A. 4th Circuit);

*Linsky vs. United States*, 6 Fed. (2d) 869 at 870 (C. C. A. 1st Circuit).

## VIII.

*Appellant's assignments of error VII and VIII are insufficient to review the action of the trial court in admission and rejection of evidence.*

“When the error alleged is to the admission or to the rejection of evidence, the assignment



of error shall quote the full substance of the evidence admitted or rejected. \* \* \* and errors not assigned according to this rule will be disregarded."

*Rule XI C. C. A. 9;*

*Lee Tung vs. U. S.*, 7 Fed. (2d) 111 (C. C. A. 9);

*Clark vs. U. S.*, 265 Fed. 104, (C. C. A. 8);

*Weiland vs. Pioneer Irr. Co.*, 238 Fed. 519, at 523, (C. C. A. 8).

## IX.

*Interest is uniformly allowed as damages for the withholding of payment of money after due date.*

"Where money is withheld after payment is due interest is, as a general rule, allowable as damages in actions based upon either express or implied contracts."

17 C. J., *Damages*, Section 136, page 811.

"Where an injury consists of a deprivation of money the compensation established by the business practice of many generations is the current rate of interest, and such is the measure of damages adopted by the law. The profits which might have been made by the use of

the money are too conjectural to be considered.”

1 *Sedgwick on Damages*, 9th Ed., Section 179;

*Mahon vs. Harney County Nat. Bank*, 206 Pac. 224, at 228.

“In the United States, by the great weight of authority, interest may be allowed on the principal sum although the recovery may be more than the amount of the penalty. \* \* \* Under the rule noted as the majority rule, where the damages equal or exceed the penalty, interest is to be computed on the penalty, and the judgment cannot exceed the penalty and interest thereon from the time of breach or the commencement of the action.”

9 *C. J.*, *Bonds*, Section 244, pages 132 and 133;

*Cf.* 17 *C. J.*, *Damages*, Section 216, p. 922;

*Platt vs. Carroll*, 119 S. E. 180 at 183;

*Southern Surety Co. vs. Enfield*, 229 Pac. 446, at 449, 450;

*U. S. F. & G. Co. vs. Koeler*, 137 S. E. 85 at 93;

*Collins vs. Tarrant County*, 242 S. W. 1105, at 1106.

In Washington, interest is allowed as damages for non-payment of unliquidated demands which are capable of ascertainment by computation.

*Park vs. Elmore*, 59 Wash. 584.

## X.

*For general authority sustaining the recovery allowed see:*

17 C. J. 1027;

*Johnson vs. Cook*, 24 Wash. <sup>474</sup>274;

*Warren vs. National Surety Co.*, 149 Wash. 378;

*Province Securities Corp. vs. Maryland Casualty Co.*, 168 N. E. 252;

*Peoples Bank vs. Aetna Ind. Co.*, 98 Atl. 353;

*Equitable Trust Co. vs. Nat. Surety Co.*, 63 Atl. 699;

*American Bonding Co. vs. Pueblo Inv. Co.*, 150 Fed. 17;

*O'Brien vs. Surety Co.*, 203 Fed. 436;

*Sylvester Watts Smith Realty Co. vs. American Surety Co.*, 238 S. W. 494;

*Rock vs. Monarch Building Co.*, 100 N. E., 887;

*Mohawk Co. vs. Bankers Surety Co.*, 156 N. W. 154;

*Janes vs. Scott*, 59 Penn. 178, 98 Am. Dec. 328;

*Union Trust Co. vs. Citizens Trust Co.*, 39 Atl. 886;

*Fidelity Trust Co. vs. American Surety Co.*, 175 Fed. 200, affirmed with adoption of opinion of the Circuit Court in 179 Fed. 699;

*U. S. vs. Fidelity & Guaranty Co.*, 236 U. S. 512, 59 L. Ed. 696;

*Maryland Casualty Co. vs. Wellston*, 148 Pac. 691.

## ARGUMENT

### I.

#### *Bank Is Entitled to Recover on Bond*

This appeal being from a judgment entered upon a directed verdict after the trial court had denied appellant's motion for a directed verdict in its favor, appellant has the burden of sustaining the proposition that under the evidence the verdict should have been directed in its favor as a matter of law.



It postulates its argument upon two propositions:

“First, that the bond runs to two obligees, and second, that either both of them jointly or one of them had given to the Wood Pipe Company an order for the purchase of materials.”

Appellant’s brief, p. 14.

These propositions are said to be conclusively established by the terms of the bond, although specific reference is made to the recitals only. The obligatory language is to the effect that the principal and surety “are held and firmly bound unto Twin Harbors Lumber Company of Aberdeen, Washington, *and/or* The National Bank of Tacoma, Tacoma, Washington, in the penal sum of Four Thousand and no/100 (\$4,000.00) Dollars, \* \* \*.” This language in its essential, italicized part is identical with the language of the recital. Appellant’s second proposition therefore belies its first. If the recital that the Pipe Company, the principal in the bond, has accepted a written order from the Lumber Company “*and/or*” the Bank, means only that either the Lumber Company *and* the Bank had given the order or that *one of them alone* had done so but without designating which one, then assuredly the language wherein and whereby the principal and surety bind themselves unto the Lumber Company “*and/or*” the Bank means no more than that they are bound either unto both of the named

obligees or only unto one or the other of them.

The bond itself therefore presents two questions of fact for determination, namely, By whom was the order placed? To whom did the bond run?

The expression "*and/or*" in a contract,

"Amounts in effect to a direction to those charged with construing the contract to give it such interpretation as will best accord with the equity of the situation and for that purpose to use either 'and' or 'or' and be held down to neither." *State vs. Dudley*, 106 Southern 364 at 365.

The trial court's determination of these questions of fact in favor of appellee necessitated the direction of a verdict in its favor and appellant is concluded thereby. (See Proposition VII and authorities there cited, pp. 30-31, *supra*.)

To avoid this result appellant has resort to a secondary proposition that there is no question of fact involved because the appellee as a party to the bond is estopped by its recitals. (Appellant's brief p. 18.)

The recitals confessedly mean no more than that the order was placed by both the Lumber Company and the Bank or by the Lumber Company alone or by the Bank alone. There is nothing in the bond itself from which it can be determined

which of the alternatives was intended. The recitals are therefore lacking in the certainty essential to create or work an estoppel. They do not amount to the precise affirmation of the fact as to who ordered the materials from the Pipe Company and therefore do not preclude the Bank from establishing the fact that it did not place the order. That fact is not inconsistent with the recital. In *Wright vs. Bucknell*, 2 Barn. & Ad., 278, 22 E. C. L. 122, supra, p. 29, an estoppel was claimed based upon a recital that the grantor was "legally or equitably seized of the premises." The court held that there was no estoppel since a recital in the alternative was not conclusive of either alternative alone and therefore the truth might be shown as to which alternative was correct. The recital here is in the alternative and the Bank therefore is not estopped from showing that it was not the party who had ordered the materials from the Pipe Company.

The authorities cited by appellant (brief pp. 18 and 19) in support of this claim of estoppel are all predicated either upon an agreement or assumption by the parties as to the existence of a particular fact. Here it is undisputed that the Surety Company and the Bank at no time agreed or assumed that there was any contract of sale of manufactured lumber between the Pipe Company and the Bank, but on the contrary, the Surety Company knew that whatever contract of that kind there

purported to be was between the Pipe Company and the Lumber Company solely, and knew that the Bank, based on the recitals in the bond, did assume and rely upon such being the fact. Moreover, the incorporation of the purported order into the bond by direct reference thereto bound the Surety Company to the facts of the order shown on the invoice or statement accompanying and forming part of the Pipe Company's assignment to the Bank. Reasonable inquiry on the Surety's part would have disclosed such facts. The correspondence between the details of the order recited in the bond with the details thereof shown in the invoice or statement assigned to the Bank entitled the Bank to rely on the bond as guarantee that the Pipe Company had accepted such an order from the Lumber Company and as indemnity against the loss which would follow if the collateral tendered by the assignment of the proceeds of that order never became enforceable.

Finally, appellant in effect asks this court to eliminate from consideration the evidence showing the situation of the parties, the circumstances under which and the purposes for which the bond was executed, and with that testimony disregarded, urges upon this court a conclusion contrary to that of the trial court.

In so doing appellant would wholly divorce the bond from the circumstances under which it was



given and from the purposes which it was designed to serve, and then so interpret or construe it as to render it a worthless scrap of paper.

To this end it now asserts that "its (the bond's) entire purpose was to protect the second party to a contract to which the Wood Pipe Company was the first party." (Appellant's brief, p. 21.) Therefore it argues the bond was wholly meaningless and ineffective because, using its own phraseology, "the bank, not being a party to the 'contract' with the Pipe Company, was not in fact an obligee under the bond." The corollary to that proposition, although not stated by appellant, is that although the Lumber Company was the second party to the contract and therefore, under appellant's theory, the sole obligee of the bond, nevertheless the bond never became effective or enforceable by the Lumber Company because never delivered, nor intended to be delivered, to it.

It is a fairly desperate last stand when appellant is compelled to argue that the proper construction of its so-called bond is one which renders it utterly worthless. However, such argument, even for what it may be worth, is not open to appellant.

Its assignments of error numbers VII and VIII (Tr. pp. 169 and 170, cf. specifications of error numbers 7 and 8, appellant's brief, pp. 10 and 11), which are the only assignments based on the admission or rejection of evidence, are insufficient to pre-

sent a claim of error for review by this court. Such assignments do not, "Quote the full substance of the evidence admitted or rejected," as required by Rule 11 of this court. No argument is attempted in support of them. (Cf. appellant's brief p. 23.)

"Counsel did not deem the question of sufficient importance to discuss it in his brief and we do not consider it of sufficient moment to depart from the general rule that such assignments will not be considered. *Clark vs. United States* (C. C. A.), 265 F. 104, 107." *Lee Tung vs. United States*, 7 F. (2d) 111, 112 (C. C. A. 9th).

It is a primary and paramount rule for the construction and interpretation of contracts that it is presumed that the parties to an instrument intended that it shall be effectual and not nugatory. 6 *R. C. L. Contract*, Sec. 239, p. 840. Accordingly, where a contract is susceptible of two meanings, one of which will uphold the contract and enable it to have and be given effect and the other of which will destroy it or render it ineffective, the former will be adopted so as to uphold the contract. 13 *C. J. Contracts*, Sec. 506, et seq, pp. 539, et seq. Appellant, by admitting that the language of the bond's recitals provide for *one* of three alternative situations (appellant's brief, p. 14), thereby conclusively answers, if it does not wholly preclude, its later argument that the only possible construc-

tion of the bond affords the Bank no right of recovery thereon.

The great rule for the construction of contracts is the ascertainment of the true intention of the parties. That intention is to be ascertained by a consideration of the subject matter of the contract, the situation of the parties when it was made, and the purpose of its execution. When, from such considerations, the intent actuating the parties has been ascertained, it is the duty of the court to put such construction upon the contract as will bring it as near as possible to the actual intent of the parties, for that intent must prevail over the dry words of the contract. (See Propositions I and II, pp. 10-19, *supra*.)

Applying these general rules, not less than six judges, two trial courts and the Supreme Court of the State of Washington, have unhesitatingly concluded that this bond, or a bond of identical language given under similar circumstances, was an original undertaking on the part of the Pipe Company and the Surety Company, appellant here, to indemnify the Bank against any loss which it might sustain because of the failure of the Pipe Company to complete and fulfill the order for materials so that the Bank would have a valid and enforceable claim for the invoice price thereof against the Lumber Company ordering the materials. So, in sustaining the Bank's recovery in a companion

case, the Supreme Court of Washington, in *National Bank of Tacoma vs. Aetna Casualty Company*, 161 Wash. 239, said at page 245:

“It was proper and competent for the trial court to receive evidence to ascertain the intention of the parties when this indemnity bond was given and delivered. To that extent, it was relevant and competent to show that the agent of the surety company had knowledge that the pipe company was under the necessity of securing advances on contracts received and accepted from a bank before the contract had been performed. It was also competent to show that the bank advanced the money on this particular order only upon the assurance that the order would be indemnified by some acceptable surety company.”

Summarizing that evidence, which summary can equally well be made here for the evidence is to all practical purposes the same, the Washington court further said:

“The American Wood Pipe Company was in a bad condition financially. It had reached a point where it was not able to carry on its business without financial aid. It received this order from the Twin Harbors Lumber Company of Aberdeen, which it could not fill because it did not have the money to manufacture the goods.



“It went to the Bank to get the money with which to carry on this manufacture. It told the Bank it had this order. The Bank said that it could not accept that order as collateral security for any loan and required some other and further assurance, something more definite. The upshot was that the bond in question was put up and when the bond was put up the Bank furnished the money. \* \* \* In order to get the money to fill the order of the Twin Harbors Lumber Company, the Pipe Company procured and delivered the bond of the Surety Company. The Surety Company gave a bond, a condition of which is that, ‘Whereas the principal has accepted a written order from the Twin Harbors Lumber Company, now, if the Pipe Company will supply the material in accordance with the written order, to indemnify the Bank against any direct or indirect damages which may be suffered by a lack of delivery of material within the time specified, then the bond to be void.’

“The Bank had nothing to do with the furnishing of the material to the Lumber Company. The only thing it was to do was to furnish the money to manufacture and ship the material to the Lumber Company. There was no other purpose for mentioning the Bank in the bond. The only reason it was mentioned at all was because it put up the money to aid the

Pipe Company to manufacture the articles for the Lumber Company.

“The Pipe Company contracted that it would manufacture and ship the goods according to order. If this contract had been complied with and the goods had been manufactured and shipped to the Lumber Company, the Bank, under the testimony, would have suffered no damage because it would have received the proceeds and recovered its money advanced to the Pipe Company;      \*   \*   \*

\*                      \*                      \*                      \*                      \*

“Obviously, however, appellant’s agents knew full well that the Bank did not manufacture lumber and lumber products and that its principal did. Without any evidence they knew that the sole business of the Bank was loaning money. Disregarding some of the evidence introduced as of doubtful relevancy and competency other than that appellant’s agents knew of the intended loan of the money by respondent upon the signed order in this bond, and sticking closely to the terms of the bond for the purpose for which it was knowingly and advisedly given by appellant, we are convinced that the bond in its terms as an indemnity bond was given for no other purpose than to indemnify respondent against the loss suffered by the non-fulfillment of the order of the Twin Harbors Lumber

Company as adjudged by the trial court."

Opin. 161 Wash., pp. 246-248.

As was well said by the Supreme Court of Connecticut in *Reed vs. Holcomb*, 31 Conn. 360:

"It is often difficult, from the mere words in which a promise is made, to determine whether any credit was given to a third person, and the undertaking, therefore, collateral to the engagement or liability of such person, or whether it was a wholly independent and original undertaking. In such cases courts must rely upon the circumstances of each particular case, and its general features, in order to ascertain the intention of the parties, and how they viewed it, where it is doubtful whether it was a contract of suretyship or guaranty, or an original undertaking."

Applying that rule to the facts disclosed by the evidence here, as did the Supreme Court of Connecticut in the case cited, and as the Connecticut court did more recently in *Wolthausen vs. Trimpert*, 105 Atl. 687, to which case the attention of this court is especially requested, we believe it is established beyond question that the bond here sued on is a direct and original undertaking of indemnity on the part of the Pipe Company and the Surety, appellant here. It is not an undertaking collateral to a contract between the Pipe Company

and the Bank for the supplying of manufactured lumber, for no such contract existed. It is not collateral to the Pipe Company's assignment note; it does not by its terms purport to be; it was not so intended. Had it been it would in effect have been a guarantee of payment of the indebtedness evidenced by such note, whereas in fact the Bank assumed all risks of collection of the proceeds of the order, e. g., the risk of insolvency of the Lumber Company, and looked to the bond to insure that through the shipment of the material according to the order there would be perfected in the Bank a legally enforceable, though actually uncollectible, claim against the orderer of the materials.

The decision of the Washington Supreme Court in 161 Wash. 239, 296 Pac. 831, is criticized at length (App. brief, pp. 23-30). The occasion therefor is clear; the justice and validity of the criticism are denied.

In the case in the state court, as here, the Bank by its complaint sought recovery of the damages sustained by it through the failure of the Pipe Company to carry out its recited contract with the Lumber Company, said damages being stated to be the amount of the invoice price of the goods covered by the order with interest from the due date thereof. In both cases the Bank contended that in reliance upon the bond of the Surety Company it had taken an assignment of the entire proceeds of the



order recited in the bond as security for a new advance of money and for any other indebtedness which might be owing by the Pipe Company. But on the trial in the state court the Bank did not attempt to prove that it held the assignment of the proceeds of the order as collateral for anything other than the advance evidenced by the so-called assignment note. It did not prove the general loan and collateral agreement in evidence here as Exhibit 13 (Tr. pp. 10-13 and 132), nor offer any evidence of any indebtedness of the Pipe Company to it other than that created by the advance made after the bond there sued on was furnished. Consequently the only damages with which the state courts were concerned were the unpaid balance evidenced by the assignment note similar in form to that in evidence here as Exhibit 18 (Tr. pp. 9 and 133) plus the accrued interest thereon. Both the arguments made and the opinion of the State Supreme Court are necessarily limited by and to be considered in connection with the proof as made.

The state court held that such a bond is an original undertaking and a contract of indemnity. Appellant's criticism of this holding is in line with its general argument and contention. That criticism might have some justification if the bond must be interpreted as though it ran to the Bank as vendee of materials from the Pipe Company, a position which it never occupied. In other words, if the facts must be distorted to fit the bond, inter-

preted wholly in the Surety Company's favor, then there may be some basis for the criticism. On the other hand, if the bond must be interpreted in the light of the facts and be given effect according to those facts and the disclosed intention of the parties so far as can be done without being inconsistent with the language of the bond itself, then the State Supreme Court was correct in its holding and entirely justified in stating that the condition of the bond related to an accepted order from the Lumber Company alone, for such was indubitably the fact.

That there are some inaccuracies of statement in the opinion of the state court is not disputed. Thus the statement from that opinion quoted on page 28 of appellant's brief clearly should have been, "Obviously, however, appellant's agents knew full well that the Bank did not *deal in* manufactured lumber and lumber products and that its principal did." But the minor inaccuracies such as this which are to be found in the opinion do not afford a basis of distinction or militate against its soundness. In the last analysis the crux of appellant's criticism is simply that the state court did not adopt and follow appellant's argument and did not give to the bond prepared by the Surety Company's agents a strict interpretation which would relieve the Surety Company from all liability.

Summarizing, it is submitted that:

The bond is not one of "plain meaning." Accordingly, the authorities cited on pages 15 to 18 of appellant's brief are inapposite. The rule applicable here was recognized, although the facts were held not to warrant its application, by the Circuit Court of Appeals for the 8th Circuit, in *New Amsterdam Cas. Co. vs. Central Nat. Fire Ins. Co.*, 4 Fed. (2d) 203 at 207 as follows:

"When a provision of a bond by a surety or insurance company is ambiguous and subject to two different constructions, \* \* \* it will be construed against the Surety Company."

"Where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer."

*Liverpool, etc., Ins. Co. vs. Kearney*, 180 U. S. 132, 135, 45 L. ed. 460, 462.

The bond having been wholly prepared by the surety's agents, it will be construed most strongly against it and any ambiguities will be resolved against the Surety Company.

*American Surety Co. vs. Pauly*, 170 U. S. 133, 144, 42 L. ed. 977;

*Maryland Cas. Co. vs. Bank of England*, 2 Fed. (2d) 793, (C. C. A. 8th);

*Hartford Accident Ins. Co. vs. State*, 159 N. E. 21, 25.

The only construction which will fit the facts and give effect to the intention of the parties is that given by the trial court.

It is not essential to a contract of indemnity that thereby the indemnitor undertakes to save the indemnitee harmless from loss resulting from his contractual liabilities.

“By a contract of indemnity one may agree to save another from a legal consequence of the conduct of one of the parties or of some other person.”

14 *R. C. L., Indemnity*, p. 43.

“There are many contracts of indemnity that have no reference to the indemnitee’s covenants contained in some other contract but are entered into to indemnify the promisee against losses from something other than his contractual liabilities. Thus there can be a contract indemnifying the promisee against loss growing out of an act or failure to act such as a contract to indemnify one for loss that may grow out of a third party’s failure to perform a contract.”

*Eckhart vs. Heier*, 158 N. W. 403, 404.



See also:

*Reed vs. Holcomb*, 31 Conn. 360;

*Wolthausen vs. Trimpert*, 105 Atl. 687.

The bond here was to indemnify the Bank against the loss or damage which it might sustain if the Pipe Company failed to perform its contract with the Lumber Company, and as a result the proceeds of that contract never became a claim enforceable by the Bank against the Lumber Company. The judgment appealed from gives effect to the indemnity intended to be provided.

## II.

### *Recovery Allowed Bank Was Altogether Proper*

The contract, as recited in the bond, called for shipment within sixty days from January 19, 1929. The terms of sale provided for a five per cent commission and a two per cent discount for cash in ten days after shipment. Therefore, the net amount realizable had the order been filled and shipment made within the time called for was \$3677.45, due on or before March 30, 1929. The Pipe Company went into receiver's hands April 19, 1929, after which date all possibility of performance was at an end. This was approximately twenty days after the due date, but no interest was claimed by the Bank or allowed by the court for that twenty days.

Appellant's statement (brief, p. 31) to the contrary notwithstanding, the Bank does contend, not that it purchased outright the proceeds of the order, but that it took for value an assignment of the whole of such proceeds (Ex. "B", Tr. p. 14) as collateral, first, for the advances then made, and secondarily, under the general loan and collateral agreement for any other indebtedness owing it by the Pipe Company. Further, it is the Bank's contention that inasmuch as the Pipe Company's proven indebtedness to it far exceeds the amount of such invoice, the measure of its damages is the net amount which would have been realizable had the Pipe Company carried out and fulfilled the order and thereby rendered the proceeds of that order collectible, together with interest at the legal rate from the due date of such proceeds. Its damages are, therefore, measured by and include the net proceeds of the invoice, with interest from ten days after the date when shipment should have been made. Damages universally include interest from the due date where money is withheld after payment is due on liquidated demands, and in Washington on unliquidated demands as well if the amount thereof can be ascertained by mere computation. 17 *C. J.*, *Damages*, p. 811; *Parks vs. Elmore*, 59 Wash. 584, 592 and 593. The liability to such interest as damages clearly must have been within the intention and contemplation of the parties and is therefore recoverable as such. 31

*C. J., Indemnity*, 429, 430; *National Bank of Tacoma vs. Aetna Cas. Co.*, 161 Wash. 239, 250.

By the terms of its bond the Surety Company was bound to indemnify the Bank against all its damages, provided the aggregate thereof did not exceed the penal sum of the bond, namely, \$4000.00, with interest thereon from the date of demand on the surety. Treating August 4, 1930, when suit was instituted, as the date of demand, the surety's maximum liability under the bond to the date of trial was therefore \$4000.00 plus \$306.00 interest. The Bank's actual damages as allowed were only \$4244.36, which was well within the limit of the surety's liability.

“As the aggregate liability \* \* \* exceeds the penalty, it (the surety) was properly held for an additional amount equal to interest from the commencement of suit.”

*Illinois Surety Co. vs. John Davis Co.*, 244  
U. S. 367 at 381; 61 L. ed. 1206 at 1212.

The decision of the Washington court reported in 161 Wash. 239, 296 Pac. 831, is not to the contrary. There the Bank sued for the amount which should have been realizable on the assigned proceeds, with interest, as measuring its damages, but as already pointed out, it elected, for reasons not here material, to go no further with its proof than to show the balance remaining unpaid on the assign-

ment note evidencing the new advance. Calculating interest on that indebtedness according to the terms of said note at seven per cent instead of at six per cent, the legal rate, the total amount proven to be due the Bank, after allowing credit for the partial payment of \$974.79, was only \$1397.48. As that amount was considerably less than the balance payable on the order, recovery was allowed without any argument over the interest or the rate at which calculable.

If for any reason it should be held that the damages recoverable under the bond must be limited to the amount due on the advance made by the Bank, with interest according to the terms of the note evidencing the same, then the total amount due on November 13, 1931, when the verdict was returned, was \$3989.23, being the amount of the advance, \$3375.00, with interest at seven per cent from January 21, 1929. Such recovery would be in exact accord with that allowed by the state court, although for reasons already discussed it is submitted that this point was not involved before the state court and its decision is therefore not controlling.



*The Bank Is Entitled to Recover the Full Amount  
of Its Actual Damages*

Appellant's argument that appellee's recovery should be limited to one-half the penalty of the bond with interest is predicated upon the proposition that the bond "was a several obligation running to the Lumber Company and the Bank," coupled with the admission that the legal interest and cause of action of the Lumber Company (if any) was separate and distinct from that of the Bank.

The same contention before the Supreme Court of Washington was adversely ruled on as follows:

"Appellant also insists that the surety could not be held liable for a double penalty as it would be if the bond be construed as the trial court interpreted, \* \* \*. Again we consider that appellant having furnished the bond itself, its language is to be most strongly construed against it and that it was understood and intended that the liability to each of the obligees was joint *or* several and not joint *and* several; and that there would be a different measure of liability to either of the obligees.

"Thus for non-fulfillment of the order to the Lumber Company the Pipe Company would be liable for damages measured by the difference

between the value of the goods at the date of the breach of the bond and their value to the Lumber Company had they been constructed and delivered within the time agreed.

“The Lumber Company was not damaged by the same matter which would damage respondent. Respondent was damaged by the non-payment of its debt \* \* \*. Where the legal interest and cause of action of the obligees is several and not joint, the covenant is taken to be several and each of the obligees may bring a cause of action for its particular damages, 4 *R. C. L.* p. 65. \* \* \*

“\* \* \* There can be no question but that the bond before us was intended to apply to losses or damages or liabilities of different character as to each of the indemnitees. It is also manifest that it was so intended by the principal and surety.”

161 Wash. 239 at pp. 249, 250.

Appellant's whole argument on this point is based on its opening statement on page 14 that the bond runs to two obligees. Accepting that statement temporarily for the purposes of argument only, it is beyond question that the rights of the Lumber Company and the Bank, as obligees, being several, either might sue separately on the bond. (See Proposition IV (b), pp. 25-26, *supra*.) The

extent of recovery allowed a several obligee suing separately is determined by:

(a) The express definitions and limitations of the bond. *Farni vs. Tesson*, 1 *Black*, 209, 17 L. ed. 67. There are no such limitations here.

(b) The fact that although the interests of the obligees are separate, yet the interests of all are equal. In such event only a proportional recovery may be had by any one obligee. Such is the case of the interest of one or several minor wards in the bond of their common guardian and is the rule given effect in *Title Guaranty & Surety Co. vs. Foster*, 203 Pac. 231, and other cases cited by appellant (brief p. 36). There is no equality of interest here. (Cf. 161 Wash. p. 249).

(c) The fact that the interests of the obligees are separate and several but unequal and not expressly defined. In such event each may recover his particular damages.

*St. Louis, Alton & Rock Island R. R. Co. vs. Cultis*, 33 Ill. 188;

*Dashley vs. Daniel*, 202 Fed. 427 (C. C. A. 9th);

9 *C. J. Bonds*, p. 94.

The present case falls in the third group or category. The evidence establishes beyond doubt that the rights of the Twin Harbors Lumber Com-

pany, if in fact it were an obligee under the bond, were not equal to and wholly different in character from those of the Bank. Its damages, if any, were to be measured by an entirely different rule than those of the Bank, as pointed out by the Supreme Court of Washington in the citations already made. But more important is the fact that because the Lumber Company had no such contract as is recited in the bond, it could not sustain damages because the shipment of that material was not made to it.

Moreover, appellant here has neither established a basis in the facts of the case nor any standing before this court to raise the point sought to be made. Under the language of the bond it might run either to both the Lumber Company and the Bank or to the Lumber Company alone or to the Bank alone. Who was the actual obligee thereunder was a question of fact for determination from the evidence. That evidence disclosed that there was no delivery of the bond, actual or constructive, to the Lumber Company and that it was not intended to be delivered to the Lumber Company. The Lumber Company was, therefore, not, in fact an obligee under the bond. Delivery of a bond is essential to put it in effect or to create rights in one purporting to be named as obligee therein. 9 *C. J.*, *Bonds*, Sec. 24, p. 16; 4 *R. C. L.*, *Bonds*, Sec. 5, p. 48.



No objection was made by the Surety Company by motion, demurrer or answer to the non-joinder of the Lumber Company. Its non-joinder involves the question of defective parties which, under the practice in the State of Washington if not raised by demurrer or answer, is waived and cannot be urged on appeal.

*Hannegan vs. Roth*, 12 Wash. 695;

*Budlong vs. Budlong*, 48 Wash. 645;

*Buckles vs. Reynolds*, 58 Wash. 485;

*Hansen vs. Hansen*, 110 Wash. 276;

*Chung vs. Fong Co.*, 130 Wash. 154.

See also:

*U. S. F. & G. Co. vs. Parker*, 121 Pac. 531.

Upon the trial, without objection and without the point now attempted to be made being in any way raised or reserved by the Surety Company, it was conclusively established that the Lumber Company had sustained no damages. Accordingly, the case now before this court is precisely as though the Bank had alleged in its complaint that the Twin Harbors Lumber Company was without interest in the bond and that allegation had been either admitted by the Surety Company or proven. As said by Judge Gilbert in rendering the opinion of this court in *Dashley vs. Daniel*, 202 Fed. 427,

“\* \* \* No exception was taken on that ground (i. e., that the want of interest of the Twin Harbors Lumber Company was not alleged) in the court below and no instruction thereon was requested, and no assignment of error presents that ground for reversing the judgment. We may assume, therefore, that although the plaintiffs in error made a general denial of the allegation that Ruhl had sustained no damages and had acquired no cause of action under the bond, it nevertheless assented to the truth of that allegation and had no meritorious ground for asserting that it was prejudiced by the omission to bring Ruhl into court.”

WHEREFORE, it is respectfully submitted that the judgment of the trial court should be in all respects affirmed.

Respectfully submitted,

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*Attorneys for Appellee.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALEXANDER STUMPF, J. L. COATES, OLIE OLSON,  
THEODORE BRIX, ZONE KIRKORIAN, D. ARKALIAN,  
JAMES PROCTOR and EUGENE L. KENNEY,

Defendants.

J. L. COATES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern  
District of California, Northern Division.

FILED

MAR 22 1932

PAUL P. O'BRIEN,  
CLERK





No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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### Names and Addresses of Attorneys.

For Defendant and Appellant J. L. Coates:

DAVID E. PECKINPAH, Esq.,

Brix Building, Fresno, California.

For Plaintiff and Appellee:

SAMUEL W. McNABB, Esq.,

United States Attorney;

P. V. DAVIS, Esq.,

Assistant United States Attorney,

Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA, NORTHERN  
DIVISION.

UNITED STATES OF AMERICA,	)	
	Plaintiff,	)
vs.		)
ALEXANDER STUMPF,	)	No. 1526-C-Cr.
J. L. COATES, OLIE OLSON,	)	
THEODORE BRIX, ZONE KIR-	)	CITATION
KORIAN, D. ARKALIAN,	)	
JAMES PROCTOR and	)	
EUGENE L. KENNEY,	)	
Defendants.	)	

TO THE UNITED STATES OF AMERICA AND TO  
HON. S. W. McNABB, UNITED STATES AT-  
TORNEY, LOS ANGELES, CALIFORNIA,  
GREETING:

You are hereby cited and admonished to be and appear  
in the United States Circuit for the Ninth Circuit, at  
San Francisco, California, within thirty days from the  
date hereof, pursuant to an Order of this Court dated

today, allowing J. L. Coates, one of the defendants above named, to appeal from the verdict and judgment heretofore made and entered against him in the above entitled action, to show cause, if any there be, why the said verdict and judgment should not be corrected and why speedy justice should not be done to the parties in that behalf:

WITNESS the hand and seal of the Hon. Geo. Cosgrave, Judge of the United States District Court, above entitled, this 24th day of October, 1931.

Geo. Cosgrave  
United States Judge

ATTEST:

R. S. ZIMMERMAN, Clerk

By Francis E. Cross

Deputy Clerk.

[Endorsed]: Copy Received Oct 24, 1931 P. V.  
Davis, Asst U. S. Atty

Filed Oct 24 1931 R S Zimmerman, Clerk By Francis  
E. Cross Deputy Clerk



## INDICTMENT

No. 1528-C-CR.

Filed.....

Viol: Section 37 Federal Penal Code; Conspiracy to violate Sections 3 & 25, Title II, of the National Prohibition Act of October 28, 1919, and to vio Sections 3258 & 3281 Revised Statutes; and Sections 3 & 25, Title II, of the National Prohibition Act of October 28, 1919, as amended.

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

At a stated term of said Court, begun and holden at the City of Fresno, County of Fresno, within and for the Northern Division of the Southern District of California, on the first Monday of April, in the year of our Lord one thousand nine hundred thirty-one:

The Grand Jurors for the United States of America, impaneled and sworn in the Northern Division of the Southern District of California, upon their oath present:

That

ALEXANDER STUMPF

J. L. COATES

OLIE OLSON

THEODORE BRIX, alias Ted Brix

ZONE KIRKORIAN

D. ARKALIAN

JAMES PROCTOR and EUGENE L. KENNEY,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom

is, other than as herein stated, to the Grand Jurors unknown, each late of the Northern Division of the Southern District of California heretofore, to-wit: continuously throughout the period of time from on or about the 1st day of September, 1930, and thereafter, to and including the date of finding and presenting this Indictment, in the County of Fresno, State of California, within the jurisdiction of the United States and of this Honorable Court, did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other and with divers other persons whose names are to the Grand Jurors unknown, to commit in the said County of Fresno, State, Division and District aforesaid, and within the jurisdiction of the United States and of this Honorable Court, an offense against the United States of America, and the laws thereof, the offense being to violate Title II, of an Act of Congress of the United States approved October 28, 1919, commonly known and designated as the National Prohibition Act, that is to say that they, the said defendants, would thereupon unlawfully, and in violation of Sections 3 & 25, Title II, of said Act, manufacture and possess apparatus intended and designed by the said defendants for the manufacture of intoxicating *liquor*, all of which should then and there be fit for beverage purposes and all of which should contain more than one-half of one per cent of alcohol by volume, none of said defendants then and there having nor intending to have a permit from the Director of Prohibition, Department of Justice, or the Commissioner of Industrial Alcohol, Treasury Department of the United States or any other

proper officer of the United States then and there authorized to issue such permits.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further charge and present that at the hereinafter stated times, in pursuance of and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purpose of said conspiracy, combination and agreement aforesaid, the hereinafter named defendants did commit the following overt acts at the hereinafter stated places, within the State, Division and District aforesaid, and within the jurisdiction of the United States and of this Honorable Court;

1. Some time during the month of September, 1930, defendants Alexander Stumpf, Theodore Brix, alias Ted Brix, and co-conspirator G. H. Malter, met in Fresno, California, at the office of defendant Theodore Brix.

2. In the early part of September, 1930, defendant Theodore Brix, alias Ted Brix, introduced the defendant Alexander Stumpf to the co-conspirator G. H. Malter, in Fresno, California.

3. Some time during the month of September, 1930, defendant Theodore Brix, alias Ted Brix, and the co-conspirator G. H. Malter, met defendant Capt. Olson at Olson's ranch for the purpose of entering into a lease of the premises of Capt. Olson, on Winery and Shaw Avenues, in Fresno County, California.

4. During the latter part of September, 1930, J. S. Coates delivered to defendant Alexander Stumpf the sum of Five Hundred Dollars (\$500.00) at Fresno, California.

5. In the early part of November, 1930, the defendant Olie Olson constructed for said defendants a still on the premises belonging to co-conspirator G. H. Malter which

was later moved to the premises known as the Foss Ranch, of about 360 acres, located about 45 miles northeast of Fresno, County of Fresno, California.

6. During the month of December, 1930, G. Hata hauled certain vats from Fresno to the place where the still was located on the Foss Ranch, hereinabove described.

7. About the 1st day of January, 1930, Defendant Zone Kirkorian delivered a gas burner to the Foss Ranch to be used in connection with the still located on the said premises.

8. During the months of December and January, 1930, James Proctor assisted in the setting up of the still and was in charge of said still at the Foss Ranch above described.

9. About the 1st day of February, 1931, D. Arkalian solicited a sum of money from G. H. Malter at the City of Fresno, California.

10. On or about the 6th day of December, 1930, the defendant Alexander Stumpf purchased of and from one Howard N. Foss, a ranch containing 360 acres located about 45 miles northeast of the City of Fresno, County of Fresno, State of California.

All contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

## SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That ALEXANDER STUMPF, J. L. COATES, OLIE OLSON, THEODORE BRIX, alias Ted Brix, ZONE KIRKORIAN, D. ARKALIAN, JAMES PROCTOR, and EUGENE L. KENNEY,



hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Northern Division of the Southern District of California, heretofore, to-wit: on or about the 1st day of February, 1931, near Fresno, County of Fresno, State, Division and District aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control, one still and distilling apparatus *apparatus* set up on the Foss Ranch, located about forty-five miles northeast of Fresno, Fresno County, California, none of said defendants then and there having, nor intending to have a permit from the Director of Prohibition, Department of Justice, or the Commissioner of Industrial Alcohol, Treasury Department of the United States or any other proper official of the United States then and there authorized to issue such permits for the possession, custody and control of said still and distilling apparatus; in violation of Section 3258 Revised Statutes of the United States;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

### THIRD COUNT

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That Alexander Stumpf, J. L. Coates, Olie Olson, Theodore Brix, alias Ted Brix, Zone Kirkorian, D. Arkalian, James Proctor, Eugene L. Kenney,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Northern Division of the Southern District of California, heretofore, to-wit: on or about the 1st day of February, 1931, at the Foss Ranch, located about forty-five miles northeast of Fresno, Fresno County, California, in the Division and District aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously engage in and carry on the business of distillers without having given bond, as required by law, with the intent on the part of them, the said defendants, to defraud the United States of America, of the tax on the spirits distilled by them, the said defendants; in violation of Section 3281 of the Revised Statutes;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

#### FOURTH COUNT

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That ALEXANDER STUMPF, J. L. COATES, OLIE OLSON, THEODORE BRIX, alias Ted Brix, ZONE KIRKORIAN, D. ARKALIAN, JAMES PROCUTOR, and EUGENE L. KENNEY,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is,

other than as herein stated, to the Grand Jurors unknown, each late of the Northern Division of the Southern District of California, heretofore, to-wit; on or about the 1st day of February, 1931, near Fresno, County of Fresno, in the State, Division and District aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully have in their possession certain property and apparatus designed and intended by the said defendants for the manufacture of intoxicating liquor for beverage purposes, then and there containing alcohol in excess of one-half of one per cent by volume, which said property and apparatus is described as—Two (2) 5000-Gallon vats, One (1) 5-horse power boiler, Eight (8) 50-Gallon vats, One (1) mash pump, Twenty-five (25) gallons of mash, hose, pipe, valves and connections to still, and One (1) still complete; in violation of Section 25; Title II, of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Samuel W. McNabb

SAMUEL W. McNABB

United States Attorney

[Endorsed]: Filed Apr 22, 1931 R. S. Zimmerman,  
Clerk By B. B. Hansen, Deputy Clerk

At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Wednesday, the 22nd day of April, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	
	)	
Alexander Stumpf,	)	No. 1528-C-Crim.
J. L. Coates,	)	
Olie Olson,	)	
Theodore Brix, alias Ted Brix,	)	
Zone Kirkorian,	)	
D. Arkalian,	)	
James Proctor, and	)	
Eugene L. Kenney, Defendants,	)	

An Indictment having been presented to the Court in this cause by the Foreman of the Grand Jury and ordered filed; upon motion of J. George Ohannesian, Assistant United States Attorney, appearing as counsel for the Government, it is by the Court ordered that the bond of defendant Proctor be fixed in the sum of \$500; that the bond of defendant Kenney be fixed in the sum of \$2000; that the bonds of defendants Arkalian and Olson be fixed in the sum of \$3500 each; that the bonds of defendants Brix, Coates, and Stumpf be fixed in the sum of \$5000 each; that defendant Kirkorian be released on his own recognizance; and that Bench Warrants issue for the apprehension of each of the said defendants except Kirkorian and Kenney.



At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Thursday, the 23rd day of April, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	No. 1528-C-Crim.
	)	
Alexander Stumpf, et al., Defendants,	)	

This cause coming before the Court for arraignment and plea of defendant Alexander Stumpf, D. Arkalian, and Zone Kirkorian, J. Geo. Ohannesian, Assistant United States Attorney, appearing as counsel for the Government, and the defendants being present in court with their attorneys, F. W. Docker, Esq., appearing for defendant Stumpf; attorney Lindsay appearing for defendant Arkalian; and D. E. Peckinpah, Esq., appearing for defendant Kirkorian; waive reading of the Indictment, and, having thereupon stated their true names to be as given therein; it is by the Court ordered that this cause be continued to April 27, 1931, for entry of plea as to each of said defendants.

At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Monday, the 27th day of April, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

United States of America, Plaintiff,	)
	)
vs.	)
	)
Alexander Stumpf, J. L. Coates, Olie	)
Olson, alias Arthur Emil Olson,	) No. 1528-C-Crim.
Theodore Brix, alias Ted Brix, Zone	)
Kirkorian, D. Arkalian, James Proc-	)
tor, and Eugene L. Kenney,	)
Defendants	)

This cause coming before the Court for entry of plea as to each of defendants Alexander Stumpf, D. Arkalian, and Zone Kirkorian; and for arraignment and plea of defendants J. L. Coates, Arthur Emil Olson, Theodore Brix, and James Proctor; J. George Ohannesian, Assist-

ant United States Attorney, appearing as counsel for the Government; and all defendants being present in court with their attorneys, F. W. Docker, Esq., appearing for defendant Stumpf; D. E. Peckinpah, Esq., appearing for defendant Kirkorian; Arthur Allyn, Esq., appearing for defendant Olson; C. Lindsay, Esq., appearing for defendant Arkalian; Frank Curran and E. J. Fenston, Esqs., appearing for all the other defendants; defendants Coates, Olson, Brix and Proctor, each enters his separate plea of not guilty to each of the four counts of the Indictment; and thereafter, defendant Kenney having entered his plea of guilty to each of the four counts of the Indictment, defendant Stumpf enters his plea of guilty to the first and fourth counts and not guilty as to the second and third counts of the Indictment and defendant Arkalian having entered his plea of not guilty to each of the four counts of the Indictment; defendant Kirkorian enters his plea of guilty to the first count and not guilty as to the second, third, and fourth counts of the Indictment; whereupon it is by the Court ordered that this cause be continued to June 5, 1931, for setting for trial of all defendants on all counts to which pleas of not guilty have been entered and for pronouncement of sentence upon defendants on the counts to which pleas of guilty have been entered.

At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Friday, the 5th day of June, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	
	)	
Alexander Stumpf,	)	
J. L. Coates,	)	No. 1528-C-Crim.
Arthur Emil Olson,	)	
Theodore Brix,	)	
Zone Kirkorian,	)	
D. Arkalian,	)	
James Proctor,	)	
Eugene L. Kenney, Defendants,	)	

This cause coming before the Court for setting for trial as to defendants J. L. Coates, Arthur Emil Olson, Theodore Brix, James Proctor, and D. Arkalian; for pronouncement of sentence upon defendant Alexander Stumpf on the first and fourth counts, and for setting for



trial on the second and third counts; for pronouncement of sentence upon defendant Kirkorian on the first count, and for setting for trial on all of the other counts; and, for pronouncement of sentence upon defendant Eugene L. Kenney on each of the four counts of the Indictment; H. G. Balter, Assistant United States Attorney, appearing as counsel for the Government, and all the said defendants being present in court, at this time, except defendants J. L. Coates and Theodore Brix; F. W. Docker, Esq., appearing for defendant Stumpf; N. Lindsay South appearing for J. L. Coates; Arthur Allyn, Esq., appearing for defendant Olson; Frank Curran appearing for Deft. Brix; C. Lindsay, Esq., appearing for defendant D. Arkalian; Attorney Green appearing for Zone Kirkorian; J. K. Reeder, Esq., is present in court as counsel for defendant Eugene Kenney; F. W. Docker, Esq., counsel for defendant Alexander Stumpf, moves the Court that sentence be imposed, at this time, also moves the Court for a reduction of bail, and the Court having thereupon denied said motions, H. G. Balter, Esq., suggests that sentence of the other defendants be continued until the date of trial; whereupon, it is by the Court ordered that this cause be set for October 6th, 1931, for trial, at Fresno, California, and that pronouncement of sentence upon the defendants will be made at that time.

At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Tuesday, the 6th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	
	)	
Alexander Stumpf,	)	
J. L. Coates,	)	No. 1528-C-Crim.
Arthur Emil Olson,	)	
Theodore Brix,	)	
Zone Kirkorian,	)	
D. Arkalian,	)	
James Proctor,	)	
Eugene L. Kenney,	)	
	)	Defendants,

This cause coming on for trial of defendants J. L. Coates, Arthur Emil Olson, Theodore Brix, James Proctor, and D. Arkalian; for pronouncement of sentence upon defendant Alexander Stumpf on the first and fourth counts, and for setting on the second and third counts; for pronouncement of sentence upon defendant Kirkorian on the first count, and for setting for trial on all other counts; and, for pronouncement of sentence upon defendant Kenney on each of the four counts; upon motion of S. W. McNabb, United States Attorney, appearing for the Government, and Peter V. Davis, Assistant United States Attorney, also appearing for the Government, and

Samuel Rappaport being present as the official stenographic reporter of the testimony and the proceedings, it is ordered that the second and third counts as to defendant Stumpf be dismissed, that all counts as to defendant James Proctor be dismissed, and that all counts as to defendant Kirkorian, except the first count, be dismissed; whereupon, L. Lindsay South and H. A. Savage, Esqs., appearing for defendant Coates, L. L. South, Esq., moves the Court for a continuance and Laurence Myers, Esq., appearing for defendant Olson having thereupon moved the court for a continuance of one week, only; Frank Curran and E. J. Fenston. Esqs., appearing for defendant Brix only move the court for a continuance, and thereafter, C. E. Lindsay, Esq., appearing for defendant D. Arkalian, having moved the Court for a continuance, S. W. McNabb, Esq., opposes a continuance, and the Court having thereupon denied said motions for a continuance, F. W. Docker, Esq., appearing for defendant Stumpf, and D. E. Peckinpah, Esq., appearing for defendant Kirkorian; now, at the hour of 10:22 o'clock a.m., it is ordered that a jury be impanelled herein; whereupon, twelve (12) names are drawn from the jury box, being as follows, to-wit:

J. C. Straube, A. Olson, Early B. Calhoun, W. L. Kennedy, Geo. Larsen, James P. Gregory, Allen Jordan, C. C. Cartwright, Wilson I. Compton, Jr., John W. Macy, Leon Akey, and W. E. Toms.

The twelve (12) jurors whose names were drawn from the jury box are called and are examined for cause by the Court, by S. W. McNabb, H. J. Savage, and Frank Curran, Esqs., respectively, and

Early B. Calhoun is thereupon excused by the Court for cause; whereupon, it is ordered that one more name

be drawn from the jury box, and the name of John L. O'Brien is called and is examined for cause by the Court, and by Frank Curran and S. W. McNabb, Esqs., respectively, and is passed for cause.

George Larsen is now excused by the Court for cause, and the Court having thereupon ordered that one more name be drawn from the jury box, the name of Conrad M. Warner is drawn therefrom; the said Conrad M. Warner is called and is examined for cause by the Court, and is thereupon excused for cause by the Court; whereupon, it is ordered that one more name be drawn from the jury box, and the name of Revere P. Fisher is drawn therefrom; the said Revere P. Fisher is called and is examined for cause by the Court and Frank Curran, Esq., respectively, and the said Revere P. Fisher having thereupon been passed for cause, is excused by the Court on the plaintiff's peremptory challenge; and thereafter, the Court having ordered that one more name be drawn from the jury box, the name of C. Roy McKeon is drawn therefrom; the said C. Roy McKeon is called and is examined for cause by the Court and S. W. McNabb, Esq., respectively, and is thereupon passed for cause.

A. Olson and W. L. Kennedy are excused by the Court on the defendant's peremptory challenge, and the Court having thereupon ordered that two more names be drawn from the jury box, the names of John S. McCain and John D. Magill are drawn therefrom; the said prospective jurors are called and are examined for cause by the Court, and S. W. McNabb, Esq., respectively, and thereafter, said prospective jurors having passed for cause, John S. McCain is excused by the Court on the plaintiff's peremptory challenge; whereupon, it is ordered that one



more name be drawn from the jury box, and the name of R. E. Dunkle is drawn therefrom; the said R. E. Dunkle is called and is examined for cause by the Court and S. W. McNabb, Esq., respectively, and said prospective juror having thereupon been passed for cause, is excused by the Court on the defendant's peremptory challenge; and thereafter, the Court having ordered that two more names be drawn from the jury box, the names of Wm. H. Sutter and Anders P. Eskilsen are drawn therefrom; the said Wm. H. Sutter and Anders P. Eskilsen are called and are examined for cause by the Court and by S. W. McNabb and Frank Curran, Esqs., respectively, and are thereupon passed for cause.

Leon Akey is excused by the Court on the defendant's peremptory challenge, and the Court having thereupon ordered that one more name be drawn from the jury box, the name of T. J. Williams is drawn therefrom; the said T. J. Williams is called.

At the hour of 11:13 o'clock a.m., the Court declares a five-minute recess, following which, at the hour of 11:24 O'clock a.m., court reconvenes, and all appearing as before, said prospective juror T. J. Williams is examined for cause by the Court, and by S. W. McNabb and Frank Curran, Esqs., respectively, and is thereupon passed for cause.

Allen Jordan is now excused by the Court on the plaintiff's peremptory challenge; and thereafter, the Court having ordered that one more name be drawn from the jury box, the name of Lewis M. Ballard is drawn therefrom; whereupon, prospective juror T. J. Williams is challenged for cause by S. W. McNabb, Esq., and is thereupon excused by the Court on the plaintiff's challenge

for cause, and thereafter, W. E. Toms having been excused on the defendant's peremptory challenge, and the Court having thereupon ordered that two more names be drawn from the jury box, the names of Adolph Buttner and Sanford C. Enos are drawn therefrom; the said prospective jurors are called and are examined for cause by the Court and S. W. McNabb, Esq., respectively; and thereafter, Adolph Buttner having been passed for cause, W. H. Sutter is now excused on the defendant's peremptory challenge; whereupon, it is ordered that one more name be drawn from the jury box, and the name of Albert Chaddock is drawn therefrom; the said Albert Chaddock is called and is examined for cause by the Court, and by S. W. McNabb and Frank Curran, Esqs., respectively, and the Court having thereupon excused Sanford C. Enos for cause, it is ordered that one more name be drawn from the jury box, the name of George Depter Smith is thereupon drawn therefrom; the said prospective juror is called and is examined for cause by the Court, and by S. W. McNabb and H. J. Savage, Esqs., respectively, and is passed for cause; whereupon, Albert Chaddock is excused for cause by the Court, and thereafter,

Wilson C. Compton, Jr. and C. C. Cartwright are excused by the Court on the plaintiff's and defendant's peremptory challenges, respectively, and John D. Magill and Lewis M. Ballard are also thereupon excused by the Court on the defendant's and the plaintiff's peremptory challenges, respectively, following which, George Depter Smith is excused on the defendant's peremptory challenge.

At the hour of 12:03 o'clock p.m., the Court admonished the seven tentative jurors in the jury box that during the progress of this trial, they are not to speak to anyone

about this cause, or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause, or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and orders that a Special Venire issue for twelve (12) veniremen returnable at the hour of 2 o'clock p.m.; the seven tentative jurors now in the jury box, being as follows, to-wit:

### THE JURY

J. C. Straube

John W. Macy

Adolph Buttner

Anders P. Eskilsen

John L. O'Brien

James P. Gregory

C. Roy McKeon

and the Court thereupon declares a recess to the hour of 2 o'clock p.m., today.

At the hour of 2:15 o'clock p.m., court reconvenes, and all being present as before, including the seven tentative petit jurors impanelled from the regular venire, Sidney J. Shannon, Deputy United States Marshal, makes his return on the Special Venire, as follows, to-wit:

Fresno, Oct. 6/31.

Returned served, City of Fresno, the following special venire:

Leon Hart, Tom Sand, A. M. King, Melvin Fredericks, H. C. Wilson, C. H. Staples, J. H. Stahl, S. L. Riddell, O. P. Bledsoe, Joe Jones, Jas. J. Senior, James Wainscoat.

A. C. Sittel, U. S. Marshal,  
S. J. Shannon,  
Deputy.

The names of the twelve (12) petit jury veniremen on the Special Venire issued today and returnable today are called and all having answered present, the said twelve veniremen are sworn on voir dire and as to attendance and travel, and are thereupon given the second oath to answer questions in this case, and they having been questioned by the Court, and the said twelve names having been placed in the jury box, it is ordered that five names be drawn therefrom, and the names of S. L. Riddell, James Wainscoat, C. H. Staples, J. H. Stahl, and H. C. Wilson having thereupon been drawn from the jury box, the said prospective jurors are called and are examined for cause by S. W. McNabb and Frank Curran, Esqs., respectively; and thereafter, James Wainscoat and C. H. Staples having been passed for cause, S. L. Riddell is examined by L. Lindsay South, Esq., the said S. L. Riddell and J. H. Stahl are thereupon excused by the Court for cause, and it is ordered that two more names be drawn from the jury box, and the names of O. P. Bledsoe and Tom Sand having thereupon been drawn therefrom; the said prospective jurors are called and are examined for cause by the Court, and by S. W. McNabb and Frank Curran, Esqs., respectively, and H. J. Savage, Esq., having examined prospective juror Tom Sand for cause, said jurors are thereupon passed for cause.

H. C. Wilson is excused by the Court on the defendant's peremptory challenge, and the Court having thereupon ordered that one more name be drawn from the jury box, the name of James J. Senior is drawn therefrom; the said James J. Senior is called and is examined for cause by the Court, and by S. W. McNabb and Frank Curran, Esqs., respectively, and said prospective juror



having been passed for cause, is excused by the Court on the plaintiff's peremptory challenge; and thereafter, the Court having ordered that one more name be drawn from the jury box, the name of Leon Hart is called and is examined for cause by the Court, and is excused by the Court for cause; whereupon, it is ordered that one more name be drawn from the jury box, and the name of Joe Jones having thereupon been drawn therefrom; the said Joe Jones is called and is examined for cause by the Court and S. W. McNabb, Esq., respectively, and is thereupon passed for cause.

The twelve (12) jurors whose names were drawn from the jury box are accepted and sworn in a body as the jury to try this cause; the names of those so sworn, being as follows, to-wit:

### THE JURY

J. C. Straube,	James Wainscoat,
Adolph Buttner,	C. H. Staples,
John L. O'Brien,	Tom Sand,
O. P. Bledsoe,	John W. Macy,
C. Roy McKeon,	Anders P. Eskilsen
James P. Gregory,	Joe Jones

At the hour of 3:24 o'clock p.m., the Court admonishes the jury that during the progress of this trial, they are not to speak to anyone about this cause, or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause, or any matter or thing therewith connected, or form or express any opinion concerning the merits of this trial until it is finally submitted to them, and declares a recess for a period of ten minutes.

At the hour of 3:38 o'clock p.m., court reconvenes, and all being present as before, including the jury, S. W. McNabb, Esq., makes a statement to the jury, and at the request of Frank Curran, Esq., all witnesses are instructed to leave the court-room, except at the request of S. W. McNabb, Esq., Government Agents Whitfield, Clements and Stribling, chemist, are permitted to remain in the courtroom; whereupon, C. E. Lindsay, Esq., moves the Court to dismiss as to defendant Arkalian which is denied by the Court.

At the hour of 4:10 o'clock p.m., Frank Curran, Esq., makes opening statement to the jury in behalf of defendant Brix, and

At the hour of 4:17 o'clock p.m., H. A. Savage, Esq., having thereupon made opening statement to the jury in behalf of defendant Coates.

At the hour of 4:22 o'clock p.m., C. E. Lindsay, Esq., makes opening statement to the jury, and

Alexander Stumpf is thereupon called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq., and the following exhibits are thereupon offered and marked for Identification for the Government, to-wit:

U. S. EX. NO. 1 for Ident.:	Column—
“ “ “ “ 2 “ “	Condenser
“ “ “ “ 3 “ “	Base

At the hour of 5:05 o'clock p.m., the Court reminds the jury to remember the admonition heretofore given herein, and declares a recess to the hour of 10 o'clock a.m., tomorrow.

At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Wednesday, the 7th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
	)	
vs.	)	
Alexander Stumpf,	)	
J. L. Coates,	)	No. 1528-C-Crim.
Arthur Emil Olson,	)	
Theodore Brix,	)	
Zone Kirkorian,	)	
D. Arkalian,	)	
James Proctor,	)	
Eugene L. Kenney, Defendants,	)	

This cause coming on for further trial of defendants J. L. Coates, Arthur Emil Olson, Theodore Brix, and D. Arkalian, and for pronouncement of sentence upon defendant Alexander Stumpf on counts one and four; on defendant Zone Kirkorian on the first count, and on Eugene L. Kenney as to all counts; S. W. McNabb, United States Attorney, and P. V. Davis, Assistant United States Attorney, appearing for the Government; defendant Coates being present with his attorneys, L. Lindsay South and H. A. Savage, Esqs.; defendant Olson being present with his attorney, Lawrence Myers, Esq.; defendant Brix being present with his attorneys, Frank

Curran and E. J. Fenston, Esqs.; defendant Arkalian being present with his attorney, C. E. Lindsay, Esq.; defendant Stumpf being present in court, in propria persona; and C. R. Triay and Samuel Rappaport being present and alternating as the official stenographic reporters of the testimony and the proceedings; now, at the hour of 10:10 o'clock a.m., court reconvenes in this case, and all being present, including the jury, it is ordered that this trial be proceeded with; whereupon, defendant Alexander Stumpf, heretofore sworn, resumes the witness stand, testifies further on an examination conducted by S. W. McNabb, Esq., and the following exhibit is thereupon offered and marked for Identification for the Government, to-wit:

U. S. EX. NO. 4 for Ident.: Yellow Card, Hotel  
Plaza, etc.

and the following exhibit having thereupon been offered and admitted in evidence for the Government, to-wit:

U. S. EX. NO. 5: Deposit Receipt dated 12/6/30 sgd.  
by Alexander Stumpf

At the hour of 11:03 o'clock a.m., the Court reminds the jury to observe the admonition heretofore given herein, and declares a ten-minute recess.

At the hour of 11:18 o'clock a.m., court reconvenes, and all being present as before, witness Stumpf is temporarily withdrawn from the witness stand by permission of the Court.

Erwin Frane is thereupon called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq., and said witness having thereupon testified on cross-examination conducted by C. E. Lind-



say, H. A. Savage, and Frank Curran, Esqs., respectively, now testifies on an examination conducted by the Court, and on cross-examination conducted by C. E. Lindsay, Esq.

At the hour of 12:08 o'clock p.m., the Court reminds the jury to observe the admonition heretofore given herein, and declares a recess until the hour of 2 o'clock p.m., today.

At the hour of 2:02 o'clock p.m., court reconvenes, and all being present as before, including the jury, it is ordered that this trial be proceeded with; whereupon,

Howard M. Foss is called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq.; and thereafter, said witness having testified on cross-examinations conducted by H. A. Savage, Frank Curran, and C. E. Lindsay, Esqs., respectively, now testifies on redirect examination conducted by S. W. McNabb, Esq.

At the hour of 2:22 o'clock p.m., defendant Alexander Stumpf resumes the witness stand and testifies on further direct examination conducted by S. W. McNabb, Esq., and the defendant having thereupon been examined by the Court,

At the hour of 3 o'clock p.m., the Court reminds the jury to observe the admonition heretofore given herein, and declares a ten-minute recess.

At the hour of 3:14 o'clock p.m., court reconvenes, and all being present as before, including the jury, defendant Stumpf resumes the witness stand and testifies on cross-examination conducted by Frank Curran, Esq., and on examination conducted by the Court; whereupon, the fol-

lowing exhibit is offered and marked for Identification for the defendant, to-wit:

Defendant's Ex. A for Ident.: Label—St. George  
S h e r r y Bitters—  
Grape Concentrate,

At the hour of 5:02 o'clock p.m., the Court reminds the jury to observe the admonition heretofore given herein, and declares a recess until the hour of 10 o'clock a.m., tomorrow.

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At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Thursday, the 8th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	No. 1528-C-Crim.
	)	
Alexander Stumpf, et al., Defendants,	)	

Court reconvenes in this cause at the hour of 10:02 o'clock a.m., for further trial of defendants Coates, Olson, Brix, and Arkalian, and all being present as before, including the jury, it is ordered that this trial be proceeded with; whereupon, witness Alexander Stumpf resumes the witness stand and testifies on cross-examination conducted

by Frank Curran, Esq., and the following exhibit having thereupon been offered and admitted in evidence for defendant Brix, to-wit:

Defendant Brix's Ex. B: Promissory note for \$150 dated 8/13/30, sgd. by Alex Stumpf and Marie Stumpf in favor of Theo. F. Brix.

witness Stumpf testifies on cross-examination conducted by H. A. Savage, Esq.

At the hour of 11:05 o'clock a.m., the Court reminds the jury to observe the admonition heretofore given herein, and declares a ten-minute recess.

At the hour of 11:18 o'clock a.m., court reconvenes, and all being present as before, except defendant Olson, witness Stumpf resumes the witness stand and testifies on further cross-examination conducted by H. A. Savage, Esq., and defendant Olson having thereupon come into court at the hour of 11:27 o'clock a.m., makes a statement re his absence, and said defendant Olson being represented by Frank Curran, Esq., pro tem. waives the benefit of any irregularity in the proceedings by reason of his absence, and is thereupon admonished by the Court to be present hereafter; whereupon, said witness Stumpf testifies on cross-examination conducted by H. A. Savage, Esq., and the following exhibit is thereupon offered, having been heretofore marked for Identification, and admitted for the Government, to-wit:

U. S. EX. NO. 4: Yellow card—Hotel Plaza.  
said witness Stumpf having thereupon been examined by S. W. McNabb, Esq., now testifies on further cross-examination conducted by H. A. Savage, Esq., and

At the hour of 12:12 o'clock p.m., the Court reminds the jury of the admonition heretofore given herein, and declares a recess until the hour of 2:00 o'clock p.m., today.

At the hour of 2:03 o'clock p.m., court reconvenes, and all being present as before, witness Alexander Stumpf resumes the witness stand and is cross-examined by C. E. Lindsay, Esq., and said witness having thereupon testified on redirect examination conducted by S. W. McNabb, Esq., now testifies on an examination conducted by the Court; and thereafter, said witness having testified on redirect examination and on recross-examination conducted by S. W. McNabb and Frank Curran, Esqs., respectively, now testifies on re-cross examination conducted by C. E. Lindsay, Esq.

At the hour of 3:32 o'clock p.m., the Court declares a ten-minute recess.

At the hour of 3:43 o'clock p.m., court reconvenes, and all being present as before, including the jury,

A. J. Olson is called and sworn and testifies for the Government on direct examination conducted by P. V. Davis, Esq., and said witness having thereupon testified on cross-examination conducted by Frank Curran and C. E. Lindsay, Esqs., respectively, now testifies on an examination conducted by the Court; and thereafter, said witness having testified on redirect examination and on recross-examination conducted by S. W. McNabb and C. E. Lindsay, Esqs., respectively, now testifies on cross-examination, and on recross-examination conducted by C. L. South and C. E. Lindsay, Esqs., respectively; whereupon, said witness testifies on redirect examination and on recross-examination conducted by P. V. Davis and C. E.



Lindsay, Esqs., respectively, and is thereupon recross-examined by Frank Curran, Esq.

E. Pusey Cain is called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq., and said witness having thereupon testified on cross-examination conducted by H. A. Savage and F. Curran, Esqs., respectively, now testifies on redirect examination conducted by S. W. McNabb, Esq.; whereupon,

Wilbert G. Whitfield is called and sworn and testifies for the Government on direct examination conducted by P. V. Davis, Esq., and is thereupon cross-examined by C. E. Lindsay, H. A. Savage, and C. E. Lindsay, Esqs., respectively, and the following exhibit having thereupon been offered and admitted in evidence for the Government, to-wit:

U. S. EX. NO. 6: Half-gallon glass demijohn full of mash.

Fred D. Stribling, chemist, is called and sworn and testifies for the Government on direct examination conducted by P. V. Davis, Esq.; and thereafter, said witness having testified on cross-examination conducted by F. Curran and C. E. Lindsay, Esqs., respectively,

At the hour of 5:08 o'clock p.m., the Court reminds the jury of the admonition and excuses said jury until the hour of 10 o'clock a.m., tomorrow, and in their absence, all others being present, the Court makes a statement to Frank Curran, Esq., relative to his decorum to which Frank Curran, Esq., makes a statement to the Court in his own behalf; whereupon, the said Frank Curran, Esq., is adjudged guilty of Contempt of Court, and fined \$20.

At the hour of 5:15 o'clock p.m., the Court declares a recess until the hour of 10 o'clock a.m., tomorrow.

At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California on Friday, the 9th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	No. 1528-C-Crim.
	)	
Alexander Stumpf, et al., Defendants,	)	

Court reconvenes in this cause at the hour of 10:02 o'clock a.m., for further trial of defendants Coates, Olson, Brix, and Arkalian, and all being present as before, including the jury, C. R. Triay and Samuel Rappaport being present as the official stenographic reporters of the testimony and the proceedings, it is ordered that this trial be proceeded with; whereupon,

Ferdinand Andreas is called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq., counsel for the Government, and said witness having thereupon testified on cross-examination conducted by H. A. Savage, Esq., now testifies on a redirect examination and an examination conducted by S. W. McNabb, Esq., and the Court, respectively; and thereafter,

W. G. Walsh is called and sworn and testifies for the Government on direct examination conducted by S. W.

McNabb, Esq., and the following exhibit having thereupon been offered and admitted in evidence for the Government, to-wit:

U. S. EX. NO. 7: Conditional Sales Contract 9/26/30  
sgd. by F. L. G. Andreas for Chevrolet Auto, and pink slip attached,  
name of F. L. G. Andreas

said witness testifies on cross-examination and on redirect examination conducted by H. A. Savage and S. W. McNabb, Esqs., respectively.

Arnold C. Franzke is now called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq.; and thereafter, said witness having testified on cross-examination conducted by C. A. Lindsay, Esq., said witness testifies on redirect examination conducted by S. W. McNabb, Esq.

At the hour of 11 o'clock a.m., the Court reminds the jury to observe the admonition heretofore given herein, and declares a ten-minute recess.

At the hour of 11:13 o'clock a.m., court reconvenes, and all being present, as before,

E. L. Kenney is called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq., and U. S. Exhibits Nos. 1, 2, and 3, heretofore marked for Identification, portions of still, are now admitted in evidence, and said witness Kenney having thereupon testified further on an examination conducted by S. W. McNabb, Esq.,

At the hour of 11:59 o'clock a.m., the Court reminds the jury of the admonition heretofore given herein, and declares a recess until the hour of 1:30 o'clock p.m., today.

At the hour of 1:30 o'clock p.m., court reconvenes, and all being present as before, J. E. Fenston, Esq., being now present,

W. G. Phillips is called out of order at the request of H. A. Savage, Esq., and testifies for the defendants on direct examination conducted by H. A. Savage, Esq.; whereupon, said witness testifies on cross-examination conducted by S. W. McNabb, Esq.

E. L. Kenney, heretofore sworn, resumes the witness stand and testifies on cross-examination conducted by C. E. Lindsay, Esq., and said witness having thereupon testified on cross-examination conducted by H. A. Savage, Esq., now testifies on an examination conducted by the Court, and is thereupon cross-examined by H. A. Savage, Esq.

James Proctor is called and sworn and testifies for the Government on direct examination conducted by P. V. Davis, Esq., counsel for the Government, and

At the hour of 2:28 o'clock p.m., the Court reminds the jury of the admonition heretofore given herein, and declares a recess for a period of eight minutes.

At the hour of 2:38 o'clock p.m., court reconvenes, and all being present as before, James Proctor resumes the witness stand and testifies further on an examination conducted by P. V. Davis, Esq.; and thereafter, said witness having testified on cross-examination conducted by Frank Curran and H. A. Savage, Esqs., respectively, now testifies on redirect examination conducted by S. W. McNabb, Esq.

Francis Morin is called out of order at the request of H. A. Savage, Esq., and testifies on direct examination conducted by H. A. Savage, Esq. as a witness for the



defendants, and is thereupon cross-examined by S. W. McNabb, Esq.

Walter G. Kerr is called and sworn and testifies for the Government on direct examination conducted by S. W. McNabb, Esq.

At the hour of 3:40 o'clock p.m., the Court declares a recess for a period of eight minutes.

At the hour of 3:50 o'clock p.m., court reconvenes, and all being present as before, witness Walter G. Kerr resumes the witness stand and testifies on cross-examination conducted by H. A. Savage, Esq.; whereupon, said witness testifies on cross-examination conducted by Frank Curran and S. W. McNabb, Esqs., respectively.

George Hugo Malter is called and sworn, and H. A. Savage and C. E. Lindsay, Esqs., having thereupon requested that this witness be excluded from testifying on the ground that he has read portion of the transcript of the testimony of witness Stumpf when witnesses were excluded from the courtroom, and both counsel having argued in support of said motion, Frank Curran, Esq., also joins in said motion for defendants Brix and Olson; and thereafter, S. W. McNabb and P. V. Davis, Esqs., having made statements, respectively, in opposition to said motion, the Court makes a statement, and P. V. Davis, Esq., having thereupon made a statement, witness Malter is temporarily withdrawn, at this time.

Wilbert G. Whitfield, heretofore sworn, resumes the witness stand and testifies on direct examination conducted by S. W. McNabb, Esq.; and thereafter, said witness having testified on an examination on voir dire by Frank Curran, Esq., the following exhibit is offered and admitted in evidence for the Government, to-wit:

U. S. EX. NO. 8: 5-page typewritten statement signed by A. E. Olson.

At the hour of 5:01 o'clock p.m., the Court reminds the jury of the admonition heretofore given herein, and declares a recess until the hour of 9:30 o'clock a. m., tomorrow.

At a stated term, to wit: The April Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Saturday, the 10th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff, )  
 )  
 vs. ) No. 1528-C-Crim.  
 )  
 Alexander Stumpf, et al., Defendants, )

Court reconvenes in this cause at the hour of 9:35 o'clock a.m., for further trial of defendants Coates, Olson, Brix, and Arkalian, and all being present as before, including the jury, Frank Curran, Esq., moves to strike certain testimony of Alexander Stumpf which motion is denied and an exception noted; whereupon, witness Wilbert C. Whitfield resumes the witness stand and testifies further on direct examination conducted by S. W. McNabb, United States Attorney, and said witness having

thereupon testified on cross-examination conducted by Frank Curran, H. A. Savage, and C. E. Lindsay, Esqs., respectively, now testifies on redirect examination and cross-examination conducted by S. W. McNabb and Frank Curran, Esqs., respectively, whereupon, said witness testifies on redirect examination and on recross-examination conducted by S. W. McNabb and Frank Curran, Esqs., respectively; and thereafter, said witness having testified on cross-examinations conducted by H. A. Savage and C. E. Lindsay, Esqs., respectively, now testifies on redirect examination conducted by S. W. McNabb, Esq.

George Hugo Malter, heretofore sworn, resumes the witness stand, and objections to said witness testifying having thereupon been overruled, said witness now testifies on direct examination conducted by P. V. Davis, Esq.

At the hour of 10:52 o'clock a.m., the Court admonishes the jury and declares a recess for a period of ten minutes.

At the hour of 11:05 o'clock a.m., court reconvenes, and all being present as before, witness George Hugo Malter resumes the witness stand and testifies further on an examination conducted by P. V. Davis, Esq.

At the hour of 12:16 o'clock p.m., the Court admonishes the jury and declares a recess in this cause until next Tuesday, October 13th, 9:30 o'clock a.m., and a recess generally until next Monday, October 12th, 1931, 10:00 o'clock a.m.

At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Tuesday, the 13th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	No. 1528-C-Crim.
	)	
Alexander Stumpf, et al., Defendants,	)	

This cause came on for further trial of the following named defendants, all of whom are present and represented by counsel as hereinafter indicated: PRESENT: S. W. McNabb, U. S. Attorney, and P. V. Davis, Assistant U. S. Attorney; L. L. South and H. A. Savage, Esqs., for J. L. Coates; F. Curran, Esq., for A. E. Olson; F. Curran and E. J. Fenston, Esqs., for T. Brix; and C. E. Lindsay, Esq., for D. Arkalian; S. Rappaport and C. R. Triay, court reporters; and the jury.

George Hugo Malter, heretofore sworn, resumes the stand and is further examined on direct by P. V. Davis, Esq., and is cross-examined by Attorney Curran.

The jury being reminded of their admonition, recess is declared at 11:22 a.m., for seven minutes.

At 11:30 court reconvenes and, all present,

Witness Malter resumes his testimony on cross-examination by Attorney Curran; is further cross-examined by



Attorneys Lindsay and Savage; and is questioned by the court. At 12 noon, the jury is reminded of admonition, and recess is declared until 1:30 p. m. Court reconvenes at 1:35 p.m., and, all present,

Witness Malter resumes his testimony on cross-examination by Attorney Savage; is examined on redirect by Attorney Davis; recross-examined by Attorney Curran; examined by the Court; cross-examined by Attorneys Lindsay and Savage. A ten-minute recess is declared, court reconvening at 3:10 p.m., and, all present,

Witness Malter is further cross-examined by Attorney Savage,

Defendant (Coates) Ex. C: 4 checks on Bank of Italy, all to order of cash, all signed G. H. Malter: 10/3/30-\$600, 10/24/30-\$200, 9/18/30-\$500, and 9/25/30-\$500.

being admitted in connection with this testimony. Witness Malter is further cross-examined by Attorney Curran.

The Government rests.

E. A. Nichols, for defendants, is called and sworn and testifies on direct examination by Attorney Curran, is cross-examined by Attorney McNabb, questioned by the court, recross-examined by Attorney McNabb, and further examinations are conducted by Attorneys Savage, Lindsay, McNabb, and by the Court.

Defendants Brix and Arkalian rest.

W. D. Coates, Jr., for defendants, is called and sworn and testified on direct examination by Attorney Savage; is cross-examined by Attorney Davis.

Mrs. Edna Pearl Coates and N. Lindsay South, Esq., for defendants, are in turn called and sworn and testify on direct examination by Attorney Savage and are cross-examined by Attorney McNabb.

At 3:58 p.m. recess for ten minutes is declared; court reconvenes at 4:07.

J. L. Broad, for defendants, is called and sworn and testifies on direct examination by Attorney Savage; is cross-examined by Attorney McNabb.

Defendant Olson rests.

At 4:12 pm the jury is admonished and recess is declared until 9:30 a.m., tomorrow.

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At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Wednesday, the 14th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff, )	
vs. )	
Alexander Stumpf, et al., Defendants, )	1528-C-Crim

This cause came on for further trial of the following-named four defendants, S. W. McNabb, U. S. Attorney, and P. V. Davis, Assistant U. S. Attorney, appearing for

the Government; L. L. South and H. A. Savage, Esqs., for defendant Coates, Curran (pro tem.) for Olson, F. Curran and E. J. Fenston, Esqs., for Brix, C. E. Lindsay for Arkalian; S. Rappaport and C. R. Triay, reporters; the jury; all present.

At 9:35 a.m., court reconvenes.

Attorneys McNabb and Savage stipulate as to the nature of Dr. Ray's testimony, if he should testify.

Defendant Coates rests, the others on trial having heretofore rested.

Argument is limited to two hours on each side.

Attorneys Savage and Lindsay move the court to instruct the jury to bring in a verdict of not guilty for their respective clients, Coates and Arkalian.

Attorney McNabb moves that the second, third, and fourth counts, as to Brix only, be dismissed.

The motions of Attorneys Savage and Lindsay are denied; motion of Attorney McNabb is granted.

P. V. Davis, Assistant U. S. Attorney, argues to the jury.

At 10:48 a ten minute recess is declared, court reconvening at 11:02 a.m., all present.

Attorney Lindsay argues to the jury for Arkalian.

At 11:38 a.m. the jury being admonished, recess is declared until 1:30 p.m.

At 1:33 p.m., court reconvenes, all present.

Attorney Curran argues to the jury for Brix and Olson.

Savage argues to the Court for Coates.

At 2:58 p.m. a ten-minute recess is declared, the jury having been admonished.

At 3:08 p.m. court reconvenes, all present.

Attorney McNabb argues for the Government.

The court instructs the jury on the law herein.

There are no exceptions to charge.

At 4:48 p.m. S. J. Shannon, sworn as bailiff, retires with the jury for its deliberation, and recess is declared until the return of the jury.

At 6 p.m. it is ordered that the jury be taken to dinner in the custody of said bailiff and at Government expense.

At 7:48 p.m., the jury return and deliberate further.

At 11:40 p.m. it is ordered that the jury be taken to the Fresno Hotel for the night in the custody of said bailiff and at Government expense; that it likewise be taken to breakfast; and that it thereafter be returned to the jury room tomorrow morning for further deliberation. The jury leaves the court house at 12 midnight and arrive at the Fresno Hotel at 12:20 a.m., October 15, 1931.

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At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Thursday, the 15th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.  
United States of America, Plaintiff, )

vs. )

1528-C-Crim. )

Alexander Stumpf, et al., Defendants, )

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This cause came on for further trial of the following four defendants, all of whom are present with counsel as indicated: PRESENT: P. V. Davis, Assistant U. S. Attorney; L. L. South, Esq., for Coates; F. Curran, Esq.,



for Brix and Olson; C. E. Lindsay, Esq. for Arkalian. S. Rappaport, reporter.

The jury, in the custody of Deputy Marshal S. J. Shannon, having left the post office building at 12 last midnight and arrived at the Fresno Hotel, Fresno, at 12:20 a.m. and breakfasted at 6:40 a.m. at Government expense, they return to the jury room at 7:40 and deliberate further upon a verdict.

At 9:44 a.m. court reconvenes, and, all present, the following verdict is read and ordered filed:

\*\*\*\*\*

We, the jury in the above entitled case, find the defendant

J. L. COATES:

GUILTY as charged in the first count of the Indictment;

NOT GUILTY as charged in the second count of the Indictment;

NOT GUILTY as charged in the third count of the Indictment;

GUILTY as charged in the fourth count of the Indictment;

ARTHUR EMIL OLSON (charged as Olie Olson):

GUILTY as charged in the first count of the Indictment;

NOT GUILTY as charged in the second count of the Indictment;

NOT GUILTY as charged in the third count of the Indictment;

NOT GUILTY as charged in the fourth count of the Indictment;

THEODORE BRIX

NOT GUILTY as charged in the first count of the Indictment;

D. ARKALIAN .

GUILTY as charged in the first count of the Indictment;

GUILTY as charged in the second count of the Indictment;

NOT GUILTY as charged in the third count of the Indictment;

GUILTY as charged in the fourth count of the Indictment.

Dated: Fresno, California, October 15th, 1931.

C. ROY McKEON

Foreman.

FILED OCT 15 1931

R. S. ZIMMERMAN, Clerk, By FRANCIS E. CROSS,  
Deputy Clerk

Attorneys Lindsay, South, and Curran except to verdict as to Arkalian, Coates, and Olson respectively.

The court thanks the jury and dismissed it for the term.

The court now orders that the following order be entered:

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA, NORTHERN DIVISION

IN THE MATTER OF THE CONTEMPT )  
OF FRANK CURRAN IN THE CASE OF )  
THE UNITED STATES OF AMERICA ) ORDER  
vs. ALEXANDER STUMPF et al, No. 1528- )  
C-Criminal. )

Good cause appearing therefor, it is ordered that the order heretofore made adjudging Frank Curran in contempt of court and that he pay a fine to the United States of America in the sum of \$20.00, be and the same is hereby amended by adding thereto the following:

“and it is ordered that in default of such payment he be placed forthwith by the United States Marshal in the Fresno County Jail and stand committed until such fine is paid by him.”

so that the said order is amended shall read as follows:

Frank Curran is adjudged in contempt of court and is ordered to pay a fine unto the United States of America in the sum of \$20.00, and it is ordered that in default of such payment he be placed forthwith by the United States Marshal in the Fresno County Jail and stand committed until such fine is paid by him.

Dated this 15th day of October, 1931.

Geo. Cosgrave,  
U. S. District Judge.

Attorney Lindsay requests a continuance to October 19, 1931, 10 a.m. for pronouncement of sentence, and, the Government not objecting, sentence is so continued.

With the Government's approval, three of the defendants are released on their present bond until pronouncement of sentence.

Upon motion of P. V. Davis, Esq., Government Physical Exhibits, 1, 2, 3, and 6 are returned to the Marshal for safekeeping.

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At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Monday, the 19th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff, )	
	)
vs. )	1528-C-Crim.
	)
Alexander Stumpf, et al., Defendants, )	

This cause came on for sentence of the following named six defendants, P. V. Davis, Assistant U. S. Attorney, appearing, other counsel appearing as hereinafter indicated: J. L. Coates, first and fourth counts (L. L. South and H. A. Savage, Esqs.); Arthur Emil Olson, first count (E. J. Fenston, Esq., pro tem.), D. Arkalian, first, second, and fourth counts (C. E. Lindsay, Esq.); Alexander Stumpf, first and fourth counts; Kirkorian, first count; Eugene L. Kenney, all counts. All of the six said defendants are present. Pronouncement of sentences is continued to October 24, 1931, 10 a.m.



At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Saturday, the 24th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	1528-C-Crim.
	)	
Alexander Stumpf, et al., Defendants,	)	

This cause came on for sentence of J. L. Coates on the first and fourth counts, P. V. Davis, Assistant U. S. Attorney, appearing, and L. L. South and H. A. Savage, Esqs., counsel for defendant Coates, appearing; G. M. Baird, reporter present; the defendant being present. The cause also came on for the sentence of the following defendants, all of whom are present with counsel as indicated: A. E. Olson (first count)—F. Curran, Esq. D. Arkalian (first, second, and fourth counts)—C. E. Lindsay, Esq. A. Stumpf (first and fourth counts)—C. Minard and F. W. Docker, Esqs. Z. Kirkorian (first count)—D. E. Peckinpah, Esq. E. L. Kenney (all counts)—B. M. Green, Esq.

Upon request of Attorney Docker, the sentence is continued, as to Stumpf, to October 26, 1931.

Attorney Savage files motion for new trial of Coates; motion is denied.

Attorney Peckinpah requests leniency for Kirkorian.

Attorney Lindsay asks that second count, as to Arkalian, be quashed and moves in arrest of judgment on said second count and for a new trial on the first, second, and fourth counts, and, the court having denied motions, moves for leniency.

Attorney Curran makes a statement as to Olson and asks probation.

Attorney Green, for Kenney, makes a statement.

The court makes a statement and pronounces sentence upon defendants for the crime of which they stand convicted.

And it is the judgment of the court

That defendant J. L. Coates be imprisoned in the federal penitentiary at McNeil Island for one year and one day, pay a fine of \$1000, and stand committed till paid, on the first count; and that he pay a fine of \$100 and stand committed till paid, on the fourth count.

That defendant Arthur Emil Olson, on the first count, be placed on two years' probation, during which period pronouncement of sentence will be deferred, provided that said defendant immediately report to Deputy Marshal S. J. Shannon, as probation officer, defendant to further report to said officer not less than once every three months for instructions, and for any infraction of the law, with the possible exception of parking ordinances, defendant will be subject to sentence.

That defendant Eugene L. Kenney, on each of the four counts, be placed on two years' probation, during which period pronouncement of sentence will be deferred, provided that said defendant immediately report to Deputy Marshal S. J. Shannon, as probation officer, defendant further to report to said officer not less than once every three months for instructions, and for any infraction of the law, with the possible exception of parking ordinances, defendant will be subject to sentence.

That defendant Zone Kirkorian, on the first count, be imprisoned in the federal penitentiary at McNeil Island, for one year and one day, pay a fine of \$500, and stand committed till paid; bond fixed at \$10,000 pending departure for McNeil Island.

That defendant D. Arkalian, on the first count, be imprisoned in the federal penitentiary at McNeil Island for one year and one day; that, on the second and fourth counts, he pay a fine of \$500 on each of said two counts, and stand committed on each said fine till paid.

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At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Monday, the 26th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff, )	
)	
)	1528-C-Crim.
Alexander Stumpf, et al., Defendants, )	

This cause came on for sentence of Alexander Stumpf on counts 1 and 4; F. M. Chichester, Assistant U. S. Attorney, and F. W. Docker, Esq., counsel for defendant Stumpf, appearing; defendant Stumpf present; M. A. Clark, reporter.

Attorney Docker and the court make statements and

The court pronounces sentence upon defendant Stumpf for the crime of which he stands convicted,

And it is the judgment of the court that defendant Stumpf, on the first count, be placed on five years' pro-

bation, to report to probation officer S. J. Shannon as required by said officer and at such times and in such manner as said officer may direct—not less than once each month; and, if said defendant violates any law other than minor ordinances such as traffic or parking ordinances, that he be brought before the court and subjected to the maximum sentence that can be imposed; and that, on said first count, imposition of sentence be meanwhile suspended. And it is the further judgment of the court that said defendant, on the fourth count, pay a fine of \$500 and stand committed to the Madera County Jail till paid.

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At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, California, on Tuesday, the 27th day of October, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	No. 1528-C-Crim.
	)	
Alexander Stumpf, et al., Defendants,	)	

Good cause appearing, defendant Alexander Stumpf being on probation for five years, and the imposition of sentence on said Stumpf on the first count having been suspended meanwhile, it is order that the motion of F. W. Docker, Esq., now made, to exonerate bond of said defendant be, and the same is hereby, denied.



The sum of \$500 is received in payment of fine, and draft is obtained on the Bank of Italy, Fresno, for said amount, draft No. 538,862, dated October 27, 1931.

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At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room there of, in the City of Fresno, (Called at Los Angeles), on Friday, the 6th day of November, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEORGE COSGRAVE, District Judge.

United States of America, Plaintiff,	)	
	)	
	)	
vs.	)	No. 1528-C-Crim.
Alexander Stumpf, et al., Defendants,	)	

This cause came on for hearing on motion of Zone Kirkorian (who is present) for an order modifying judgment and sentence heretofore rendered and imposed herein, pursuant to order filed Oct. 30, 1931. C. R. Triay, court reporter, present. Attorneys D. E. Peckinpah, counsel for defendant Kirkorian, and S. W. McNabb, U. S. Attorney, make statements. J. G. Ohannesian, Assistant U. S. Attorney, makes a statement, and has no recommendations to make, but feels that the court would be justified in reconsidering sentence. Attorney Peckinpah makes a further statement. The court makes a statement and orders that fine be remitted, but otherwise that sentence stand, and defendant is remanded to the custody of the Marshal at Los Angeles.

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA NORTHERN  
DIVISION

UNITED STATES OF AMERICA,	(
	)
Plaintiff and Appellee,	(
	)
-vs-	(
	)
ALEXANDER STUMPF, OLIE OLSON,	(
THEODORE BRIX, ZONE KIRKORIAN,	)
D. ARKALIAN, JAMES PROCTOR and	(
EUGENE L. KENNEY,	Defendants, )
and J. L. COATES,	(
	)
Defendant and Appellant.	(
	)
-----	o

BILL OF EXCEPTIONS OF DEFENDANT  
J. L. COATES.

BE IT REMEMBERED: That heretofore the Grand Jury of the United States, in and for the Southern District of California, Northern Division, did find and return to and before the above entitled court its Indictment against the defendants, Alexander Stumpf, J. L. Coates, Olie Olson, Theodore Brix, Zone Kirkorian, D. Arkalian, James Proctor and Eugene L. Kenney, and that thereafter, at a regular term of said District Court of the United States for the Southern District of California, Northern Division, the defendants J. L. Coates, Olie Olson, Theodore Brix and D. Arkalian, being then and there arraigned in person, appeared and pleaded not guilty to the said indictment.

(Testimony of Alexander Stumpf)

Thereafter, on the 6th day of October, 1931, the above cause came on for trial before the Honorable George Cosgrave, one of the Judges of said court, and a jury was duly impaneled to try said cause. For the various parties to said cause there were the appearances following:

For Plaintiff: Hon. Samuel W. McNabb, United States Attorney, and Peter V. Davis, Esq., Assistant United States Attorney:

For Defendant J. L. Coates: N. Lindsay South, Esq., and H. A. Savage, Esq.;

For Defendant Olie Olson: Lawrence Myers, Esq.;

For Defendant Theodore Brix: Frank Curran, Esq., and E. J. Fenston, Esq.;

For Defendant D. Arkalian: C. E. Lindsay, Esq.

Thereafter, and after the trial of said cause, and prior to the preparation and filing of this Bill of Exceptions, David E. Peckinpah, Esq., was, by order of said court, substituted as attorney for the defendant J. L. Coates in lieu of N. Lindsay South, Esq., and H. A. Savage, Esq.

After a jury had been duly impaneled and sworn to try said cause, the following proceedings were had:

ALEXANDER STUMPF

was called as a witness on behalf of the Government and, after being duly sworn, testified in substance as follows:

DIRECT EXAMINATION

My name in full is Alexander Stumpf and I live, and have lived nearly all my life, in Fresno, California. I was born and raised here. For the last three months I have been employed working for Libby, McNeil & Libby, a packing concern.

(Testimony of Alexander Stumpf)

Once before I was convicted of a felony in this court. This is the second time. I have pleaded guilty to this charge in this case, and I was convicted once before.

I am acquainted with Ted Brix, or Theodore Brix. I am also acquainted with the defendant J. L. Coates. I know D. Arkalian; also Mr. Kirkorian. I know the defendant Proctor and also the defendant Kenney. I knew all the defendants and am familiar with them. I know Mr. Malter and Mr. Kane, Mr. Kerr and Mr. Foss.

About the early part of September, 1930, I had a business transaction with Theodore Brix. About six months before that I had my first business transaction with Brix. It was concerning aviation. He joined the West American Aviation Corporation, and I was selling stock for the company.

I had known Brix for some time. I don't know the length of time, but maybe I had known him ever since a boy.

I went to jail about February and got out July 18, 1930. I didn't see Brix while I was in jail, but saw him the early part of September, after I got out. I saw him here in Fresno, at his office at the Brix Service Station.

I went over to the station, and Brix says: "I want to talk to you on a business proposition." At that time I did not know that Brix wanted to see me. He said he and another friend, he had a small still making brandy at the time, but they weren't selling it quite fast enough, they wanted to know how much I could distribute. At that time he told me that the friend was G. H. Malter, who was not present at the time.



(Testimony of Alexander Stumpf)

In response I said: "If it is a good proposition I will take you up." Then he said: "I will get ahold of Malter." In fact, he called him on the telephone, Malter's house, and he wasn't there, but he said, "I will get hold of him in a few days and I will let you know, and we will meet here." That was all that took place at that interview.

In a few days I went back to the Brix Service Station again, and Ted said: "I got hold of Malter and he said he will be here by noon, 12 o'clock, and we will talk the matter over." Prior to that time I had never met Malter; did not know him at all. At this time Brix knew that I had served a term in the county jail. Everybody knew it. Brix and I discussed it many times.

About an hour after Brix called on the telephone he appeared. While waiting for Malter, Brix and I talked to some extent with reference to liquor transactions. When Malter came Brix introduced me to him and said: "That is the fellow that, he knows all about it. He has got a good connection with a man out here in the country." And then he said further: "Do you want to take him in, or do you want to show the matter like that in the—" Malter was laughing and he said: "All right, we will go in; I am as game as you are."

The proposition that was made was that I was supposed to take care of the entire output. They said at that time that they had a still. They said it was small capacity. The conference between us lasted a couple of hours. They stated: "Mr. Malter will handle all the cash, as you sell it you hand all the cash over to Mr. Malter." Brix said, well, one of them, I do not know which one, "We will have to put some more money into

(Testimony of Alexander Stumpf)

the outfit." So Brix left and got \$500 in cash and handed it over to Hugo Malter, in my presence.

That was some time in September, in the office of Brix at the Brix Service Station, in 1930. The three of us were present. As compensation I was supposed to get salary and commission at that time. I think the salary was to be \$10 a day and I was to draw a one-third interest, one-third of the profits.

After that first conference Malter and I rode around talking matters over, what we were going to do, and so on.

Q. Tell us what you and Malter said, that is, I don't mean the exact words, but in substance what you said and what in substance Malter said.

MR. CURRAN: I object to that as hearsay and not binding on the defendant Brix.

MR. McNABB: Of course, your Honor, it would not be hearsay when we have established a conspiracy. It may be subject to a motion to strike. But we can not prove a conspiracy without going to a certain point and then if the conspiracy is not proven of course it would not be admissible as against the defendant who was not present.

THE COURT: The conversation that you are asking about, is that occurring subsequent to the meeting of Malter, Brix and the witness, which he said took place at the station? I assume that it is Mr. Brix' station?

THE WITNESS: Yes, sir.

MR. McNABB: That is correct. It is subsequent.

THE COURT: Subsequent to the time when, according to the testimony Mr. Malter became a member of the conspiracy, therefore what he said is clearly admissible after that. Overruled.

(Testimony of Alexander Stumpf)

A. Well, he was telling me how good a brandy they had, and so on, that they were selling a little, but they weren't selling quite a bit at that time. He asked what kind of connections I could make. So I went and told him how long I had been in it, and kept on talking, so we adjourned until the next day.

Next day Malter picked me up at my house and we went to the Brix Service Station and we told him. The three of us had a very small conversation there at that time. All three of us were talking that we were going to start in now, and I wanted to see what kind of outfit they did have, what kind of brandy they had, before I would go out ready to sell. They did not say where the still was located at that time.

Hugo and I, we left there, we drove out to Winery Avenue, he said: "Here is the fellow by the name of Olson," he said, "who has been making it for us. He is a peculiar fellow. We won't go in on him at this time. We will go over at the ranch and we will talk further on this deal." We went over on Malter's ranch. We went in the house. There was nobody present except me and Malter.

He told me then that they didn't have a still but this man Olson would build for them. Malter made the statement, he said: "Olson is the man that will build the still." He didn't say which Olson at that time. By that time it got to be about 12 o'clock. He said: "I will have Olson over here, I am going to meet him over here around 2 o'clock at the house." So he took me on home, and in the afternoon he came and picked me up again. We went

(Testimony of Alexander Stumpf)

back to his ranch, and Olie Olson was there then. I had not known Olie Olson prior to that time.

He introduced me to Olie Olson, and he said: "He is the man that knows how to build stills." I questioned Olson a little bit, how much he knew about a still, and Malter and I decided, "Well, we will take Mr. Olson to build the still," and we gave him a \$100 bill to buy material to begin with on the still. That was about 2 o'clock, or a little after. Olson said he didn't have a place to build it, so Hugo said that he could build it right there on the ranch, in the library there. This was supposed to be an alcohol still. There was nothing said to me by Mr. Brix or by Mr. Malter about going into the grape concentrate business. Neither one of those gentlemen ever at any time during my transactions with them made any statement to me about my engaging in the grape concentrate business.

After that interview Mr. Malter and I went out to look over a place to set up the plant. We drove all over. We didn't find any place at that moment. During that trip Malter and I had more conversation about the still business. We talked about how big a capacity we wanted, what we were figuring on putting into it, and so on. We did not find a place for the still that afternoon. That night he took me back home again.

The next morning we met again at the Brix Service Station. Hugo Malter, Mr. Brix and myself were present. It was some time in the morning, must have been around 9 or 10 o'clock. We told Brix we got Olie Olson started and gave him some money to buy material for the still. Brix said: "That's good. You want to hurry up and



(Testimony of Alexander Stumpf)

get it started, so we can get our money back.” He said we could find a place to put the still on. Malter said, “All right, we will come back out and look again.” That was all that was said on that occasion.

Malter and I went out and we propositioned Cap Olson, we told him that we would give him \$100 a month for the use of the place and \$10 a day for working for us. Cap Olson’s place is on Winery Avenue. That is right in the City of Fresno. Olson and his wife, and J. H. Malter and myself were standing out in the yard talking it over about putting the plant there and moving tanks there. Cap Olson and his wife talked it over, and then they says, “Well, we will accept your proposition.” I says, “Well, how soon could we move tanks over here?” “Well,” he says, “move them in tonight.” I says, “All right.” So we gave him \$100 and we told them there was going to be a Jap in there tonight with some tanks on the truck.

So Malter and I left, and we went over to the Jap; Malter hired the Jap. His name was Hatta. We told Hatta that we wanted them tanks hauled over to Cap Olson’s place that same night, not to fail, and the Jap hauled them over there. Only a part of a tank was hauled over to Olson’s place. That night I took Malter home and then went home. I next saw Malter at his ranch the following day. We went over to Cap Olson’s place, and when we got there Cap Olson told us he had changed his mind and didn’t want to accept our proposition. He told us that he got scared. We said that was perfectly all right. We left him.

Then we went to look over another place, but found none that day. The next day we decided to put it on J. H.

(Testimony of Alexander Stumpf)

Malters ranch. He has a kind of a house in the back there, setting away from Winery, so we decided to put it there. We talked to Olie Olson in the morning, and he said that he would rent 5 acres and he would be in charge of it over there. There is a small house on the 5-acre place, setting in the bank, on the Malter ranch. Malter and I told him what it was for; that it was to put up a still. Malter wanted to have the lease. He wanted to cover on himself so that he could not be involved in it. We wanted a lease on the ranch in somebody else's name.

Olson agreed to build a still. We talked to Olson. He was working in Malter's library, building the still; we talked to Olson about this 5-acre place, and he accepted it. Finally I says, "We will pay you \$10 for doing that."

In about 4 or 5 days Brix came out to the Malter ranch and we saw him. We took him in to the library and showed him that the still was started. The library is on the outside of the house. It is connected with the winery. It is about 150 feet long and 50 feet wide. It is plumb full of books. When Brix came out Olson said that his iron wasn't very good, and the solder wasn't so hot, so Brix says: "I will get you some good solder and soldering iron." At that time the still was taking shape. He had a column all together and soldering in the heads. Brix said he would go and get some good solder.

He came back the same day and had some solder and soldering iron. He said to Olson, "Let me solder for a little while; I will show you how to make a neat job." Olson said, "All right," and Brix proceeded to solder on the still. He worked there about five minutes. He said

(Testimony of Alexander Stumpf)

to Olson, "You solder like this and you get a neater job than the one you are soldering."

I would know that column if I saw it. That is the column. This is not either of the columns. I have seen these columns before. I have seen them out on the ranch at Auberry before they were set up. I can identify this (referring to one of the columns) as part of the equipment that was on the Auberry ranch.

The base and the big column is the one that came off of the Malter Ranch. The shorter column was made on the Foss ranch.

MR. McNABB: We offer Government's Exhibit No. 1 for identification at this time.

MR. DAVIS: And I suppose that may be marked as Government's Exhibit 1?

THE COURT: It being the longest column?

MR. DAVIS: Yes, sir.

THE WITNESS: The original column was stolen. I don't know when. It was completed and Malter hid it some place, and when we went back to get it, why, it wasn't there. The other smaller drum is called the condenser.

MR. McNABB: We offer the condenser for identification as Government's Exhibit No. 2.

THE WITNESS: This arrangement at the base is called the base.

MR. McNABB: We at this time offer that as Government's Exhibit 3 for identification.

When Mr. Brix and Mr. Malter and myself first engaged in this enterprise, I met a man by the name of

(Testimony of Alexander Stumpf)

Denney. I met him at Brix Service Station. It was after I first took up the matter of the distribution of whisky with Mr. Brix. It was when we just got started on building this still. The circumstances of that meeting were that G. H. Malter and I went over to the Brix Service Station and met Mr. Brix, and he had a fellow over there by the name of Denney. Mr. Brix told us that this man was going to buy the entire output under a certain price. So we decided we would go some place and discuss the matter. So he suggested that we go over to the Brix home place and discuss the matter over there. We went there, and had a discussion regarding the matter. Denney was present. There were five of us present. I don't know the other party, that is supposed to be Denney's partner.

Mr. Brix told Denney that we were operating or were ready at that time and our entire output was sold at that time, and that we were going to enlarge the plant, and we would take him under certain consideration, providing that we could get a certain price for the alcohol. I don't know where this man Denney lived, or where he lives now. No definite agreement was entered into with Denney that day. Denney offered \$3 a gallon to buy the entire output and dispose of it as fast as we could manufacture it. The offer was not accepted by us three gentlemen. I said that we could get more money for it and we had better talk it over among ourselves, the three of us, to see first what we would do with Denney. So we stayed at the house for awhile and Denney left, and he came back within a few days later. Then we had another conference. The same parties were there. At that conference we turned down Denney. We never came to any definite agreement.



## (Testimony of Alexander Stumpf)

About this time Brix gave me \$150 to buy an automobile. I gave a note for it. The agreement was that inasmuch as I had to have a means of getting around to act in the business, he loaned me \$150 with which to buy a car. I was to furnish my own transportation. The note was supposed to be paid back within 90 days. It was supposed to be paid out of my share of the proceeds of the business. Suit was afterwards brought on that note by Mr. Brix. I have never paid the note.

I remember a tire transaction between Mr. Brix and Mr. Olson. Mr. Olson had to have a tire to put on his car in order to run around to buy material and different things for the still, and he didn't have any money, so Brix says, "I will go into town and send you out a tire right away." It wasn't but about half an hour, why, there was a tire there for his car. I was right there.

That was the first day when the three of us met together. I don't know the exact date of it.

It was some time in September \$500 was paid by Brix to Malter. After that time Mr. Brix paid me money. Brix gave me \$500 at the fair grounds the day before the fair started, in the presence of Larry Woods and Jed Clark, to give to G. H. Malter. After that I had a conversation with Malter and Brix in regard to that \$500. The first time the three of us got together I got the \$500 and turned it over to G. H. Malter.

We met right after the fair and the three of us, Brix, Malter and myself, and I says, "Hugo, you better tell them that you received the \$500 that I gave you the day before." There was no dispute about the \$500. I know a place known as Kane's place. It is located on Peach and Butler

(Testimony of Alexander Stumpf)

Avenues, I believe. It is off Butler there, close to the railroad tracks.

I purchased tanks with some of this money that had been raised. I purchased them from the Compress Cotton Gin out here on Calvert. I bought three tanks from them. I also bought other tanks, but not with that money. Those tanks that I purchased were taken in the first instance over to Kane's place on Peach Avenue. There was no particular reason for taking them to Kane's place, only G. H. Malter didn't want to have them over at his place. We asked Kane if we could store our tanks over there for a few days, and he said yes. They were just put in storage there. There was no arrangement by which they were to be set up there. They remained there probably two weeks, and from there they were taken over to A. J. Olson's place first, and were left there about 24 hours. A Jap named Hatta took them over there. From Olson's place they were taken to G. H. Malter's place, where they remained for several weeks. From Malter's place they were taken over to Caruthers. I had rented a ranch at Caruthers. They were at Caruthers a couple of weeks. From the Caruthers ranch they went back to Malter's place. They remained there for about 30 days until they were removed again, this time, to the H. N. Foss ranch. Andreas, a young fellow working for Coates at the Service Station, hauled tanks back again from Caruthers place to Malter's. They were hauled from the Malter place to the Foss place by Hatta, the Jap.

I first met the defendant J. L. Coates in Fresno. G. H. Malter and I were coming down Fulton Street, and he says, "There goes Lloyd Coates." He says, "He is

(Testimony of Alexander Stumpf)

interested in some scheme of this kind. I will go and talk to him." He said, "Do you know him?" I said, "No." We came down Tulare Street, and Malter got out of the car and went over and talked to Coates. This was some time in October, 1930. I overheard the conversation between Malter and Coates at that time.

I next met Mr. Coates at the G. H. Malter ranch. It was the same day that we saw him on the street. We had a conversation with Coates out there. Malter and myself were present. Mr. Malter told him that we wanted to set up a still, and asked if he wanted to come in with us. Coates said, "Well, if it's the right thing, why, I will be glad to come in." Malter told him it was an alcohol still. Coates then asked me several questions. Then he said, "Well, I will come in with you." Coates asked me if I ever ran a still before. He asked me what kind of connections I had. He wanted to know my life's history. I told him that I was selling booze before, and I just came out of jail not so long ago. He said he was satisfied that I knew the business, that I knew something about it. I told him that I had several locations in view. I said, "If you want to see them, why, I will take you out and show them to you." So he says, "Fine." He says, "We will go out and look at them," so we got into his car and I took him out here behind Clovis and showed him a big ranch out there that a fellow owns by the name of Smith. Then I says, "This fellow lives in San Diego. He don't live here. We can take a trip down there and see what we can do with him." I said also, "There is a place down here at Caruthers." We looked that over, too. We came back. He says, "Well, I will meet you tomorrow."

(Testimony of Alexander Stumpf)

Next day I met him again at the G. H. Malter ranch. Coates and Malter and myself were present. Well, the three of us were there, and I said in order for me to go to San Diego there has got to be some money in the pot for me to go. Coates asked, 'How much do you think you need?' "Well," I said, "it will cost at least around \$40 to \$50 to make the trip there but we must as well put in enough money to start in right as to start in half-way." They said they would go to town and get \$500 apiece. They both left together in one car. I remained on the ranch. They came back with the money and paid me \$500 apiece.

After I got the money Coates said: "You want to get busy and get down there and get back as soon as you can, so we will know where we are at on this place." He said, "Go over to the service station, over to mine, and fill up with gas and oil and charge it to my account." I says, "No. While we have this money we might as well keep it straight and pay for the gas and oil as we go along." That is all that was said by any of us.

Subsequently I went to San Diego, but was not able to make any arrangement for the Smith ranch. I left in the afternoon, and was back next night. When I got back Mr. Coates and Mr. Malter were not in town. I saw them later. I saw Malter and he got hold of Coates, and we met at the Malter ranch. Coates, Malter and myself were present at that meeting. I told them what the outcome was about the Smith ranch, that he did not know at the present time whether he wanted to rent it out or not. I told them I had expended \$40 on the trip. They said we had better go over and see what could be done about



(Testimony of Alexander Stumpf)

the Caruthers ranch, and I told them I was satisfied I could close it right away. They said I should go over and close it up, so I went to Caruthers and saw the man over there and made an arrangement with him and rented the place. Then we went ahead and hired some men to go to work. Coates said he had a good man by the name of Andreas, and Malter said he had a good man by the name of Kerr. Both men were hired. Andreas was supposed to do the hauling back and forth, and Kerr was to work on the place.

About this time we talked about buying a truck. This conversation was at Malter's place, Coates, Malter and myself were present and it was some time in October, the latter part. Coates said he could buy a truck on discount from G. H. Walsh. The three of us drove over there and saw some trucks. We then talked to Walsh and purchased a Chevrolet truck. The three of us went to Malter's place together. We purchased the truck on contract. We paid \$100 or \$125 down. The contract was supposed to be in Andreas' name, because he was running the truck, so we had Andreas sign the contract.

The defendant Coates was never present on the premises at Caruthers. I saw him in the neighborhood.

At a conference at the Malter ranch several weeks after we had rented the Caruthers place, we decided to move. It didn't look good to us, so we moved. By "we" I mean Malter and Coates and myself. The place didn't look good because we kind of got a tip that the officers were going around the place seeing us moving in and out, so we had to leave the premises. The conversation which we had was as to how much money it cost us at that place.

(Testimony of Alexander Stumpf)

There were some figures made at that time about expenses incurred. Mr. Coates made those figures. I have *been* before this card which you show me.

The Government offered this card as Exhibit 4 for identification.

I saw Mr. Coates' writing on a card similar to that. Mr. Coates wanted to know how much money was spent on the place, so I had it down on a piece of paper, and I read it out to him. I haven't that piece of paper now, and I don't remember what the various items were, from memory. I can tell you some of it. I don't know, there were tanks, there was electricity, there was gas and oil expenses, a trip to San Diego and lumber bill. Those were all noted down on the yellow card that I saw at the time by Mr. Coates. Gas was gotten from Mr. Coates in large quantities for the enterprise. We had to have some gas, so Mr. Coates said: "You come over to the station and pick up three drums of gasoline." So I said, "All right, we will send Hatta over there tonight and we will be there." He said, "It will be on a truck setting in back of the service station. All you have to do is drive up, and if there is nobody there, put them on the truck and go away." That was while we were at the Caruthers ranch. We decided to use electricity for heating purposes at the Caruthers ranch. It was available.

After we got frightened and left the Caruthers ranch, we brought the equipment back to the Malter ranch and looked around for a different location. When I say "we" I mean Malter and myself.

We looked over different territories, and finally decided on a place we would take, El Senora Vineyard, that is on Winery Avenue.

(Testimony of Alexander Stumpf)

Q. Was there any discussion with Mr. Coates about the new location?

A. Yes, sir.

Q. When and where and who was present?

A. Coates and Malter and myself, we drove by in Mr. Coates car and showed him the location.

We could not close the deal there in El Senora. Then we didn't do anything for a while until we got in connection with the H. N. Foss ranch. I made the contract with the H. N. Foss ranch. I made it with Babe Bell and H. N. Foss. The ranch was finally bought. The paper which you show me is one of the originals of the contract of purchase with Mr. Foss. That is my signature there and also Mr. Foss' signature.

The Government thereupon offered in evidence, and there was introduced as Government's Exhibit 5, the contract of purchase for the Foss ranch. The document bore date December 6, 1930, and recited receipt from Alexander Stumpf of \$500 as deposit on account of the purchase price of the ranch, and provided that the balance should be paid in designated installments, the total balance being \$7000.00. The instrument bore the signatures of Bessie V. Fos, H. N. Foss, by H. N. Foss and Alexander Stumpf.

After I had bought or leased this Foss ranch and entered into this contract, I had a meeting with Coates and Malter. We met practically every day, or every other day. Sometimes it would be at the Coates Service Station, and sometimes out at the house. There was discussion about the still and liquor activities. The first conversation after we had moved the equipment to the Foss ranch was between Coates, Malter and myself on the Foss ranch. I

(Testimony of Alexander Stumpf)

drove out to the Malter ranch one night and Coates and Malter were there. Coates said he wanted to go out there and see the place. He wanted to see how the equipment and the plant looked set up. I said, "All right, we will go out there." So Coates and Malter and myself went up there and went into the barn and saw the equipment.

Q. Did you have any conversation with either one of them at that time?

A. Well, Mr. Coates said that it looked very good. Malter was well satisfied with it.

MR. SAVAGE: Just a moment. I ask that both answers be stricken out as conclusions of the witness.

MR. SAVAGE: I move that the answer be stricken out, the last two answers of the witness, as a conclusion.

THE COURT: That he and Malter and Coates went up to the Foss ranch?

MR. SAVAGE: No, he said that Coates thought it was all right, and Malter didn't think it was very good.

THE COURT: Well, I assume when he is giving his understanding of the result and the statements made at the time, that is properly admissible. Overruled.

MR. SAVAGE: Note an exception.

Q. By MR. McNABB: \* \* \* Had the still then been completed to a point where it was operating?

A. No, sir.

Q. What was said at that meeting by Foss or by Coates, and what by Malter and what by you after looking at the still?

A. Well, I don't know everything. We had a long conversation.



(Testimony of Alexander Stumpf)

Q. Well, I mean in substance, the substance of it.

A. Well, as I said, we went into the barn and Mr. Coates, he said, "This is the first time he ever seen a pot set up." It looked very good to him, and Malter said he was satisfied with it at that time. We kind of looked over the ranch, the lay-out a little bit, because it was dark.

We didn't meet anyone else there. I didn't see Proctor or Kenney. Then we came back to Fresno.

On Saturday Coates took me back up to the Foss ranch. The still was not in operation at that time. It was set up. It wasn't running. Coates saw the still on that visit. We were not there more than ten minutes. I told him we were going to start the pot in a day or so and that I would bring him a sample down, to see what it is like. Then we came back to Fresno.

Subsequently we started the still in operation. It was about three days after the visit of Coates that I got the fire under it. As a result of the operation of the still I got some alcohol. We had enough so that I poured it out in a small mayonnaise jar and took it down to Coates' Service Station. He was there and of course they sampled it. Coates said it was very good. Then I went back out there again. I told him that we couldn't run it because we didn't have the proof. We only had a proof of about 150. I said the mash was not fully fermented, we would have to wait until the mash was fully fermented. The reason the mash was not fully fermented was because it was too cold weather. That situation had to be remedied by boarding up the barn on the inside. I communicated these recommendations to Mr. Coates.

(Testimony of Alexander Stumpf)

Prior to this time I had met a man named D. Arkalian, one of the defendants. I first met Arkalian about the last days in November, 1930. I met Arkalian at my house in Fresno. He said he wanted to see me on some important business. I said I could meet him some time after 8 o'clock. He said all right. We arranged to meet in front of Tiny's Waffle Kitchen, on Broadway. Later I met him there. We were sitting in his car. He said he had a big proposition, if I was interested in making some money. I said, "Yes." I says, "When it comes to money, I am always interested." So he said that he was going to Los Angeles; that he had been transporting some narcotics back and forth there. I said, "Well, that is out of my line." Well, he says, he is going to Los Angeles. I says, "Well, I have got a good friend down there that you might be able to see. I can send him a telegram. He is in that kind of business, and maybe you can make some connections with him." So he left the next day and went to Los Angeles, telling me he would see me when he got back. I saw him when he got back. He came over to the house.

MR. LINDSAY: If Your Honor please, I move that all the testimony of this witness as to the conversation between him and the defendant Arkalian at the time specified be stricken out. It does not seem to have any connection with this matter here. \* \* \*

THE COURT: It is preliminary, showing the relationship; between the parties and explaining their relations. Perfectly proper, I think. Overruled.

MR. LINDSAY: Save an exception.

After Arkalian came back from Los Angeles I had a conversation with him. This took place again in front of

(Testimony of Alexander Stumpf)

the Waffle Kitchen on Broadway. Arkalian and myself were present. He said he made a big connection down there with some fellow about Nailey Miller himself, he made a connection, but I don't know where. But he said, "Did you like to make some money?" I said to him, "Well, I have got a good proposition for you." He asked what it was, and I told him. I told him I had a still and some vats and a good place to make booze. I said it would take about \$1500 to invest in the sugar for operation. He said, "I don't like that business." He said, "I don't know much about it. I like the other business." "Well," I says, "we can't do anything." He says, "Well, I will go to the office and I will let you know in half an hour. I will be back here and let you know whether I will go with you in that." I says, "Well, where will me meet?" He says, "Meet me at the service station." That is a Kern, I don't know, the Richfield station on Broadway—Broadway and Mariposa.

Subsequently I met him there. He said he would go into it; that he had to go to Modesto, to see his uncle, or brother, or somebody. I don't know who, but some other fellow by the name of Arkalian. He would be back and he would put in the money next day. Subsequently I again saw him, in front of the Waffle Kitchen. He said he couldn't get the money from his brother, or whoever the relative was in Modesto. He said, "The only way I think I could promote this sugar is to buy it on credit." He said, "We have been buying off of Justesen, the chain store," he says, "and I think that I can promote sugar from there." So I says, "It ain't very good policy to charge it because on account of a checkup."

(Testimony of Alexander Stumpf)

We then discussed the matter of his borrowing some money. I told him about Franzke. He said he would give his automobile as security. We went to Franzke and he agreed to lend Arkalian \$1500. He was to close the matter with Franzke the following morning. I didn't see him until the following afternoon. Then he told me that Franzke had turned him down. He then said he could borrow the money some other way. He then asked me if I knew Zone Kirkorian, and I told him I did. Kirkorian is another defendant in this case. He said, "I will get Zone Kirkorian. I am satisfied that Zone will go. I will put the proposition to him". We then parted, promising to meet the following day. We met next day at the same place, in front of the Waffle Kitchen. Arkalian and myself were present. He stated that he had made an appointment with Kirkorian right after lunch.

The three of us met subsequently at the Sequoia Hotel. Zone Kirkorian, Arkalian and myself were present. Kirkorian asked me what I had, and I told him I had a still and some vats and I had a good location to put it at. We made an appointment to meet the following day to visit the Foss ranch, and then separated. The next day Kirkorian, Arkalian and myself met, and all three went in Arkalian's Ford automobile to the Foss ranch. We got there some time in the afternoon. We didn't go all the way to the ranch, because there is a kind of a hill like. We stopped on top of the hill and looked the situation over, and drove back out. We did not go down to the house. At that time I didn't explain anything to Kirkorian and Arkalian about the still. We were talking about the location. That was prior to the time we moved to the



(Testimony of Alexander Stumpf)

Foss ranch. We came back to town, where Kirkorian asked that we meet him again on the following day. He said he would give us the money then.

Next day we met him at the hotel again. Arkalian, Kirkorian and myself were present. We took another ride up to the ranch. On the way back I showed him another location, which belongs to the Bullard ranch. We looked at the place, and on the way in Kirkorian reached in his pocket and handed me 15—handed me \$1200. Kirkorian reached in his middle pocket and pulled out a roll of bills. I did not know how much there were and counted them out. We were talking on the way back that we would buy the sugar off of Zone Kirkorian's father. I told them it was all right with me wherever they bought it. He named the present price of sugar and kept \$300 out of \$1500 and handed me \$1200. I don't know what Arkalian said about it just at that time. Kirkorian and Arkalian then went to San Francisco. They brought back 100 pounds of yeast and two 5-gallon cans of grain syrup. Zone Kirkorian brought that back. After they got back they asked me what was going on out there. I told them we were setting up the vats now, getting ready for the mash. Zone Kirkorian and Arkalian were together. The conversation was either at my house or at the hotel.

Q. Now, what other transactions did you have with Arkalian?

MR. LINDSAY: It does not appear, if your Honor please, and I object to the question as immaterial and irrelevant. It assumes something not in evidence, because it does not appear yet that he ever had any transaction with Arkalian.

(Testimony of Alexander Stumpf)

THE COURT: Well, I think the question is to be considered what if any there were. The court will assume that. Answer the question. Did you have any transaction with Mr. Arkalian?

MR. LINDSAY: Save an exception.

A. Yes, sir.

Q. What was the next transaction you had with Arkalian?

MR. LINDSAY: Same objection, if your Honor please.

THE COURT: Overruled.

MR. LINDSAY: Same exception.

A. I told him I was putting up the tanks and getting ready to put in the mash, and we went over and got the sugar from Kirkorian's father. They said, "Hurry up, so we will get some returns."

Arkalian made other visits to the Foss ranch. He came up about the middle of December, he and Zone Kirkorian, and looked over the situation up there, but they did not go inside the building where we were working.

Q. Was anything said at any time in any of these transactions as to the interest of Kirkorian and Arkalian in the business?

This question was objected to by the defendant Arkalian, on the ground that it was leading and suggestive and irrelevant and immaterial—reprehensibly so. The asking of the question by the United States Attorney was assigned as error. The objection was overruled, whereupon the defendant Arkalian, through his counsel, excepted.

A. Yes, sir.

(Testimony of Alexander Stumpf)

Arkalian, Kirkorian and myself were in Kirkorian's room at the Sequoia Hotel. Zone Kirkorian said, "Now, D. Arkalian and I, we are going in and take \$1500, that is, half interest in the concern." The other half is mine. That was said in Arkalian's presence. The understanding was that I should have half the business and Kirkorian and Arkalian the other half. I did not tell them that Coates owned an interest in the business. As a matter of fact, at that time Coates and Brix still had their investments in the business.

Arkalian made visits to the ranch after that. He and Zone Kirkorian came up and brought up some blankets to the ranch. We had to have some blankets for the men to sleep on. Arkalian said he could get the blankets, and Zone Kirkorian brought the blankets. Arkalian did not come up on that trip. We purchased a burner for the still from the California-Fresno Oil Company. It was a gas burner. I bought the burner.

Stumpf had a conversation with Coates and Malter regarding the moving of the stuff from the Caruthers ranch.

Q. And what was done, what was said about that?

A. Well, they thought it was all right to move it off.

\* \* \* \* \*

From the Coates ranch the equipment was moved to the Walsh place by Andreas.

From the Caruthers ranch the equipment was moved to the Walsh place. It was subsequently moved up to the Foss ranch. The Jap, Hatta, nauled it up. On account of the cold weather the mash did not ferment properly, and I told Arkalian and Kirkorian that we would have to

(Testimony of Alexander Stumpf)

board up the sides of the barn and make it close and put in enough heat to ferment the mash. Arkalian said he would get the plaster board and the two-by-fours and nails in order to board it up. Zone Kirkorian, D. Arkalian and myself were present at this conversation, in front of the Hotel Sequoia. It was in December, 1930.

Next morning I picked up Kirkorian at the hotel about 7 o'clock. We drove to Arkalian's ranch and met him there. We took his Ford truck, went over to Reedley to the lumber yard and picked up the plaster board and came back to the plasterer's and picked up some two-by-fours. Then we went over to the ranch house and picked up some nails. Then I drove on up to the ranch. When I loaded the lumber at the lumber yard, Arkalian was there, and so was Kirkorian and myself. And I then hauled the plaster board up to the Foss ranch in Arkalian's truck.

I bought pipes and fittings for that still. We bought them here on "O" Street, somewhere. Zone Kirkorian paid for them. The three of us went over there, Arkalian, Kirkorian and myself. I took the pipe fittings up to the ranch. Proctor and Kenney and myself did the work of putting up the plaster boards.

I got gas on the Arkalian ranch to take up to the Foss Ranch. That was in December, 1930. Kirkorian and Arkalian and myself met in front of the Sequoia Hotel and took a little ride in my car, and we discussed the Arkalian ranch in the evening. That evening in my car I got some gas at the Arkalian ranch. I got three drums, about 165 gallons. I took that gas out to the Foss ranch in a Cadillac touring car. Arkalian was there when I got the gas. He did not go with me up to the hills.



## (Testimony of Alexander Stumpf)

The still was there about three weeks before it was dismantled. After I took the gas up, Arkalian was up there. The occasion of his going up was to see what the outcome of it was up there. I had a talk with him on that occasion. Zone Kirkorian and Arkalian came up both times together. We went into the barn and I showed them how the boiler and the plaster board was put on and how it was set up and what difference it made in temperature. They left the ranch shortly after that. Afterwards I saw Arkalian on and off, about every other day. He went back to the Foss ranch again after that. Kirkorian was with him on this trip. We discussed the matter of fermentation, because the stuff was not fermenting very good. They stayed about ten or fifteen minutes. Arkalian was up there numerous times.

I never saw Mr. Coates and Mr. Arkalian there together. Neither one of them ever told me that they had been there together.

After that we all got in a squabble up there. I mean Arkalian, Kirkorian, Coates, Malter and myself. I met Coates one day out at Malter's house. I told him that I was through with the outfit, that I did not want anything of it any more, and whoever they wanted to take possession of it was all right with me. So we argued around there quite a while, and Coates said he would take a man up and he would run it for us. I said all right. He said he would bring up the man Saturday afternoon. I went up and Coates came up with Olson. That was in January, 1931. Coates and Olson came up together. He said he brought up Olson to look the plant over and see what we had on and I should show him what there was and

(Testimony of Alexander Stumpf)

what to do. Olson was going to take possession and run it. We went into the barn and they looked it over, and Olson tasted the mash, dipped his finger into the vats to see how the mash was, and looked over the still and everything else. He said, "Everything looks all right." When we came out of the barn Proctor came up and said, "Stumpf, I think we have been here long enough. Before we run the still now, why, we want some money." I said, "The boss is up here now, and I will tell him about it and he can see you." I went and told Coates that. Coates refused to put up any more money. He refused to pay. He said, "Run the stuff and then take the money out of that." I should judge Coates and Olson stayed on the place about half an hour that day. Then they came back to town. That night I talked to Coates at an apartment house where he was staying in Fresno. Kenney was present. I said that the best way to do was to pay the boys, because they wouldn't run it until they got their pay. Kenney was kind of sore, he wanted his money, and Coates refused, so Kenney and I left. I never talked with Coates after that about the matter.

After that I talked with Arkalian about the matter. I was on Fulton Street. Ed. Nichols, the detective, said, "Come up in my office. I want to see you once." I went up, and when I got there he took me in a side room. While in this room I heard Arkalian talking in another room. He said to Ed. Nichols, "I will give you \$500 in cash if you can get that still back by tonight for us." The only time I saw Nichols was when Nichols came up and opened up the door, and I saw Nichols when he took me over to the other room. Arkalian said, "I have got to have that

(Testimony of Alexander Stumpf)

still back by tonight." He says, "If you will go and get it, why, produce the still back tonight, and I will give you \$500 in cash."

I talked to Arkalian about that matter afterwards. He came to my house and said, "Well, what are we going to do about that matter out there?" This was some time in January, of this year. Nobody but Arkalian and myself were present. At this time he asked me to get my brother and hijack the still. He said that when it was hijacked there would be no evidence. I talked to Arkalian again once after that. That was also in January, and at my house. Arkalian and myself were present. At that time Arkalian again wanted to know why I didn't go up and get the still and have it over with. I told him I was not going to do it. I told him to go and get it. After that I had no more conversation with him about the business.

After I brought Coates the sample of alcohol in the mayonnaise jar, I had other conversations with him. We had conversations practically every other day. He put up money on different occasions. All together, over the entire period, in the aggregate, he put up around \$1700 or \$2500. I don't know the exact figures. I never kept tab of it. After I gave him the sample, Coates was out to the Foss ranch at least four times. That was in December, 1930.

Brix terminated his connection with the matter. Malter and myself went over to the Brix Service Station and we met Mr. Brix. We had a little trip into San Francisco together, the three of us, and right after that trip, why, we went over to see Mr. Brix, so we went into his private office, and we was talking about it, Brix said he wouldn't

(Testimony of Alexander Stumpf)

put any more money into the business until we could show him the progress of it. After that I never again took up with Brix the matter of putting any money into it.

Brix sued me for \$150 on the note I had given him. Afterwards I had a talk with him at his service station. He told me the suit was a mistake by his attorney, that he would see that it was fixed up. So he gave me a demurrer. My attorney, Myers, handed me the demurrer. Myers was my attorney. He gave me a copy of the demurrer. There was no more conversation between Brix and myself about that debt. The matter just stood there on demurrer.

I was the manager of the still business. I never registered this still with the Collector of Internal Revenue of this district. I never got a permit from the Director of Prohibition, or any Government official of any kind, for the operation of it. I never gave a bond for operating a still or engaging in business as a distiller. To my knowledge, none of these requisites was ever complied with by anyone.

The still was taken up to the ranch in sections. I took part of it up. Some of it was taken up by Kenney. I had nothing to do with the dismantling of the still. I don't know of my own knowledge who did. I never saw the still, or any part of it, after it left the ranch until I saw it here in the court-room. I had nothing to do with the dismantling of the still.

Cap Olson was taken up by Coates to run the still. He didn't run it, he didn't stay. Cap Olson's visit was after the sample of liquor was distilled. Proctor, Kenney and myself distilled the liquor, that is the liquor I brought down and gave to Coates.



(Testimony of Alexander Stumpf)

CROSS-EXAMINATION

Heretofore I was convicted of two felonies against the United States Government. On one of them my sentence expired July 18, 1930. After my release I worked for the Warren Refining Company, of Richmond. I worked for them two months. I was working for them when I met Ted Brix in 1930.

I previously pleaded guilty to this charge here. I pleaded guilty to the first count and the fourth count of the indictment.

Q. Well, you are testifying just as a citizen doing his duty, is that your idea?

A. Yes, sir.

Q. And nothing has been offered you to do it?

A. No, sir.

I met Brix about a week after I got out of jail, at his service station. He told me that he and Malter had a small pot out here and they had a man manufacturing brandy for them. When I asked Brix where the pot or still was located, he said, "You will find out later on."

When Malter and Brix and myself came to the agreement to operate a still and the money was put up, it was agreed there should be nothing in writing, there would be no memorandum, there would be no receipts so that they could be traced back to any of us. I did put my signature to this promissory note dated April 13, 1930, for \$150. Notwithstanding our agreement that there should be no writing, I signed the note for \$150, payable to Theodore Brix. My wife also signed the note. She was not present at the time the agreement to operate a still was discussed. When I was sued on this note I put

(Testimony of Alexander Stumpf)

in a demurrer. I told Lawrence Myers, the attorney, about the case, and he told me to come back, and when I came back he handed me the demurrer. I signed the demurrer.

I always made some memorandum when I paid out money. I paid out money and made memorandum of it "numerous times, most of the times he (Malter) was with me." When it was paid out, he would slip me the money and I would pay it to the other fellow. I did not give receipts or memorandum in writing.

With reference to Arkalian and any dealings that I had with him, Ted Brix's name was never mentioned. He had no connection whatsoever with Arkalian. Ted Brix had no connection with Mr. Coates in this enterprise. And he had no connection with the defendant Kirkorian. I never mentioned his name to Kirkorian during all this enterprise. I never mentioned the name of Ted Brix to Mr. Proctor. I never mentioned the name of Ted Brix to Mr. Kenney.

Arkalian first approached me on a proposition concerning narcotics. I told him that was not in my line. I didn't ask Brix at any time to let one of his airplanes be used for a trip down to Old Mexico to haul back narcotics across the line, and I didn't guarantee him \$48,000 for one trip. I had no conversation of that kind with Ted Brix. I didn't offer Ted Brix \$4 a gallon for every gallon of alcohol hauled from Stockton by airplane. I made no such proposition as that.

At this point Defendants' Exhibit B was introduced in evidence on behalf of the defendant Brix.

(Testimony of Alexander Stumpf)

I never talked during the Summer of 1930 to anybody about putting money into a grape concentrate deal. I went to work for Malter in the grape concentrate deal about January, of this year. I worked for him a few days.

I do not know how much Coates contributed to this still. I don't know the exact amount. I was supposed to be the manager of the enterprise, but I didn't know that. I know just about how much Arkalian put in. I don't know the full amount, he didn't put in any cash outside of the lumber and the materials. I don't know how much that amounted to. Kirkorian put in \$1000. I don't know the exact amount Coates put in. I said between \$1700 and \$2500 yesterday. To my knowledge Malter didn't put in anything. I testified that in the first meeting Malter put up \$500 and Ted Brix put up \$500. I seen that money, but as far as I know of he didn't spend it, or anything else. Well, yes, he put it up. In all I don't think over \$3500 to \$4000 was contributed. I got \$1500 from Kirkorian, \$1700, between \$1700 and \$2500 from Coates, and Brix put up \$1000, and that all makes \$4200, even if I counted the \$1700 instead of \$2500 for Coats, but I don't believe there was over \$4000.

Q. Well, you have got \$1500 for Kirkorian, \$1700, between \$1700 and \$2500 for Coates, and you said Brix put up \$1000, that makes \$4200, even if I counted \$1700 instead of \$2500 for Coates.

A. Well, I don't believe there was over \$4000.

I don't know how much the still cost. I was manager. I don't know how much was spent for it. I don't know how much was spent for labor. I never did pay Kenney

(Testimony of Alexander Stumpf)

a cent. He was paid some. I bought some cigarettes and grub, and so on, down the line. I didn't pay him in cigarettes and grub, but some of them was deducted. I don't remember how much was paid. I don't know that Proctor was paid anything. There were no other men that I know of who put up money besides Coates, Kirkorian, Arkalian, Brix and Malter. Hatta was paid. He was supposed to be paid. I did not see him paid and did not pay him myself. I didn't know that he was paid. Olson was paid some.

After Ted Brix told me that he was through with the thing I saw him many times. We never met about this enterprise.

Q. By MR. CURRAN: And at that time and place you saw and were in the room with Earl Fenston, Lawrence Meyers and this defendant Ted Brix, were you not?

A. Yes, sir.

\* \* \* \* \*

Q. Yes. You meant that you would take the witness stand and if you told the truth Ted Brix would be acquitted, didn't you?

A. Yes, sir.

At this point Mr. Savage took up the cross-examination of the witness on behalf of the defendant J. L. Coates.

I have known Mr. Malter since 1930, just before I entered into this arrangement. I never knew him before. I am 31 years of age. In the beginning the arrangement between Brix and Malter and myself was that Brix was to help put up the money, Malter to put up an equal amount and we were to go three ways on a still. Malter was to be treasurer. He was to handle all the money. The



(Testimony of Alexander Stumpf)

arrangement with reference to Mr. Coates' participation was altogether different. Under the arrangement with Mr. Coates, he was to give me his money. When Malter, Coates and myself were together, we had an understanding as to who was to handle the money in the Coates deal. The meeting took place at the Malter ranch some time last year, somewhere around October. Coates was not particular as to who was going to spend his money. I never saw Coates before. When I met him I handed him a card of the Warren Oil Company. I said I was traveling for the Warren Refining Company. I handed him my card. It was agreed I should handle his money. Coates said, "Well, who are we going to turn this money to?" Malter and Coates had a little conversation in my presence and they agreed to turn the money over to me. They said I should go to San Diego and close up the lease.

Q. Just a minute.

A. On the place.

Q. I want the conversation and I am going to ask that the witness—

THE COURT: No, Mr. Savage, he is giving the substance. As I understand the witness, he is giving the substance of the conversation between the two, is that correct?

A. Yes, sir.

There was quite a bit of conversation. I don't remember the whole. I don't know every word of it. Anyway, it was agreed that I should be the treasurer of the Coates-Brix—I mean the Coates-Malter-Stumpf combination. That was an entirely different thing and a separate deal from the Brix-Malter-Stumpf combination. I took all the

(Testimony of Alexander Stumpf)

money and became treasurer. I kept no record of any of the expenditures.

Q. Well you had this agreement with Mr. Malter on the Brix-Stumpf-Coates, Brix-Stumpf-Malter little combination No. 1, we will call it; you did not have any such understanding with No. 2 combination?

A. No, sir.

Q. Did you keep any memorandums at all?

A. I did not.

Q. Did Mr. Malter?

A. To my knowledge, he did, yes.

Q. He did, of everything that was spent?

A. Yes, sir, not everything.

Q. What?

A. Some of it.

To my knowledge Mr. Malter kept a record. He kept a record, but not of everything that was spent—some of it. There was only once or twice when Malter gave me money. When he gave me money, he did not say, "Put this money up."

I knew whether I was getting Brix's money or Coates' money or Malter's money, because Coates handed me his and Malter handed me his. In the beginning there was an understanding that Coates and Malter would play ball and I would be the manager, and Coates and Malter and myself were going to split three ways. That was the deal in the Coates combination. Mr. Malter was to put up half the money and Mr. Coates half the money. I knew all the time that Mr. Malter never put up any money. We were fooling Coates. Coates believed Malter was putting up 50-50 all the time. We had two deals, one deal with

(Testimony of Alexander Stumpf)

Brix to start with, and another deal with Coates to start with. Malter and myself were in all of them. We kept no separate record or accounting at all.

I met Coates for the first time in October, 1930. I met him on the street and out of a blue sky. Malter and myself were driving along the street and he says, "There goes Coates; he is interested in some kind of a proposition like this. Let's touch him up for a little money." Malter stopped and talked with him a little bit. I did not meet him then. Malter and Coates did not go into the Bank of America that I can recall. Malter came back and reported to me, "I think he is all right; I think he will put up some money." Malter explained to me what he meant when he said Coates was interested in a proposition of this kind. He said in a booze deal. He did not mention a grape concentrate deal. I heard that mentioned many times, but not at that particular time. I heard it on the street, but not between us before this indictment. I never heard Malter mention about a grape concentrate deal with Mr. Coates. I met Mr. Coates out at Mr. Malter's house a little later.

The arrangement was that each one was to go 50-50. It was agreed that those two furnished the money. I was not supposed to put in a thing. I was going to get a third. At that time I was not to get any salary. I was to get expenses. I was never to get a salary in the Coates-Malter combination. It was just a split on the profits. The Coates-Malter-Stumpf and the Malter-Brix combinations never did get together. They were always kept separate. I never told either of them that I was building stills. The deal was that Coates and Malter were supposed

(Testimony of Alexander Stumpf)

to put in the money 50-50, and out of the profits I was supposed to get a third.

After this little talk Mr. Coates seemed to become very enthusiastic. We had already bought the tanks from the Compress Company when we got Mr. Coates into it. We had had those probably 30 days. I don't believe we told Coates anything about having the tanks. We bought three of the tanks with Brix's money, Brix's second \$500. Those tanks cost about \$42 apiece. Malter and Coates went downtown and came back with \$500 apiece in cash. They came back to the Malter ranch. Each one of them handed me \$500. Malter did actually give me \$500. I did not slip it back to him on that day. Later on he got it back. After Coates and Malter came back from San Francisco, Malter asked me, he said, "You better give me some of that money." He said, "Give me my \$500 back." So \$500 was all the money that I had. That was the money that Coates put up, the real money. The other was just make-believe.

Then we continued to talk about locations. We had talked about locations before. I said the Smith ranch. That is out behind Clovis, about six or seven miles. There are a couple of vineyards right close. Most of it is grain. There are vineyards pretty much from there on into Clovis and clear on into Fresno.

When we started in we agreed to start in right away, start in operation and get busy and do something. We were going to do it very quickly. We meant to start manufacturing alcohol. As to how long it takes to make a still that depends on who is making it. I don't know how long it would take a real mechanic, working in a



(Testimony of Alexander Stumpf)

legitimate way, to make a still. I never made one. I guess it would take half a dozen days. I told Coates it would take 30 to 40 days, maybe 50 to get to operating.

It was Malter that first suggested going to Coates and trying to get some money out of him.

Q. It was his own thought. Did Malter suggest himself that we gip Coates to the extent that "I will pretend to be putting in 50-50 and mine will be slipped back to me under cover and we will use Coates' money?"

A. Yes, sir.

Q. Malter suggested that too?

A. Yes, sir.

Q. Did Malter tell you that he had known Coates all his life and had gone to school with him, was a friend of his, gone to the house?

A. Yes, sir.

Q. And lived with him? And that did not bother you at all, I presume?

A. No, sir.

I went to San Diego and spent \$40. I saw Smith when I was down there. Smith was undecided about leasing the ranch. I told Smith we wanted to rent the ranch as a cattle ranch. It must have been a week or so thereafter that I again spoke to Coates about money.

I did not keep Coates advised as to all that I was doing, some things, but not all. I never told Coates that Olson and myself were going to build this still. Cap Olson and I never built this still. We never agreed to build the still. I didn't tell Coates that Olie Olson was building a still for me. I didn't tell Coates who was building a still for me *building a still for me*.

(Testimony of Alexander Stumpf)

We used some of Coates' money in building the still that Olie Olson was building for me and Brix and Malter. The deal between me and Brix and Malter was an entirely different deal from the deal between me and Coates and Malter, but we did use some of Coates' money in the deal between Brix and Malter and myself. The deal dropped with Brix at that time. It dropped about 40 or 50 days when we first started. Brix had clear run out on me on this job before I called Coates in on this deal.

I don't know whether the statement in the indictment that Coates paid \$500 in September is correct, or not. I don't remember the dates and if the \$500 was put up by Coates September 19, 1930.

Q. Well, supposing the date when this \$500 was put up was September 19, 1930, then you are all mistaken about Brix being out of it at the time Coates first came in, is that correct?

A. I don't remember the dates.

Cap Olson never worked on the still. Olie Olson didn't finish the job of constructing the still on the Malter ranch. First the material was put up there between Brix, Malter and myself. That was the latter part of August or September, somewhere in there. Anyway, Brix stayed in the deal 30 or 40 days after that, maybe 50 days.

I went out to the Fresno Compress Company with Hugo Malter to buy those tanks. That was Brix's money at that time. I don't remember the date. I bought those tanks when I came back from San Diego. We went over there and bought five tanks. The capacity of those tanks was 7200 gallons each. You can use those tanks for anything, for water, or anything. They are the same identical tanks

(Testimony of Alexander Stumpf)

that you would see in any grape concentrate or in any grape juice business. You can use those tanks for anything; for water or anything. I discussed with Mr. Malter and Mr. Coates the capacity of these tanks. We would need almost 40,000 gallons in tankage to turn out 250 gallons a day. It takes quite a bit of mash. You have to wait for fermentation. Sometimes you have to wait. It all depends on the weather and the building you've got. It would take longer than two weeks in the month of November. I bought five 7200-gallon tanks, and they were hauled out there to Malter's place. Brix had already bought three. They cost about a cent a gallon. It will all run up to about \$350 or \$400.

I told Coates that I had put up a deposit on a still that I was going to buy in Los Angeles. I didn't tell him how much it would cost. I told him that would depend on the capacity, but I did tell him I actually put up a deposit on it. That was not the truth. I told him I was going to get a still. I told Coates this less than 30 days, about 15 days, after he had put up the first \$500. The conversation occurred out at Malter's house. Hugo Malter was there. We were in the front room. I told Hugo Malter the same thing. He was present. He knew it was a fake.

After Coates put up the \$500 the first time I got more money out of him later on. It must have been 7 to 10 days after, Coates gave me the next money. He didn't ask me what I did with the first thousand. I never said a word. I told him about the trip to San Diego and that it cost \$40, and I told him that we bought some tanks with the other thousand. I told him I wanted the next money to keep the project going. Hugo Malter was with

(Testimony of Alexander Stumpf)

me. Hugo said, "Well, I am willing to put in more." Malter and Coates decided among themselves as to how much more they would put in. The understanding was they would keep on putting in money until it was completed. Neither one of them said anything about what had happened to the first \$1000. I guess all Hugo would have to say to Coates was, "Just give me \$500." When Hugo told them he got the money without any explanation, because he always got the money.

I told Coates about the Caruthers deal before I got the first five hundred. He seen the Caruthers place. He seen the Foss ranch before he put in any money.

Q. He never—he never was out to the Caruther's Ranch but always went far, wide, and around it?

A. Beside the place.

I told the Caruthers man I wanted that place for farming, raising horses, turkeys, and so on. I got the name of the party. It was Morton. It was in October, some time. I never told Coates what the still would cost. I sent tanks out to the Caruthers place. Andreas hauled the tanks out, and he hauled them back. That was some time in October. Before he hauled them out, I went down and bought this truck from a man named Walsh. Malter was along. Mr. Walsh was there and Mr. Coates. Mr. Coates said, "We will buy this Chevrolet truck." I don't remember the price. I believe it was four and a quarter, something like that, or five and a quarter. It was a used truck. Malter said it was O. K. with him. It was agreed between Malter and Coates and myself that we would use the truck to haul, that we would use the truck just for transportation, hauling tanks and equipment and alcohol.



(Testimony of Alexander Stumpf)

We didn't tell Walsh that. We weren't going to tell Walsh anything. I knew a truck used for hauling alcohol could be confiscated. Walsh didn't ask anything about what the truck was to be used for. I don't remember who paid the \$100 on the truck, whether I did or Coates did. I was treasurer of the organization and had the money, but I don't remember who paid it. The truck was to be part of the Coates-Malter-Stumpf combination, part of the company's property. Neither I nor Mr. Malter ever made any claim to the truck. I did not hire Andreas but directed him and paid him for labor. I don't remember the amount, I kept no record of it. I paid him cash. I took a pressure system besides the tanks out to Caruthers. The pressure system cost \$125. I bought it from a man named Kerr, whom I had known for a couple of weeks. Malter introduced me to Kerr. Malter told me that Kerr could be trusted and he knew how to set up a still.

I told Mr. Coates that I had bought a water system; that I would have to have it for a still. I never sent anything out there that looked like a still. There was nothing of any still sent to that place, nothing at all. I told Coates I was getting an electric burner out there, and I told him that I had made arrangements with the water company to be connected up with power and that I was getting an electric burner. I ordered an electric burner. I don't remember what it cost, but I think about \$22.50 apiece. There must have been six or eight of them. The burners arrived and I saw them at Malter's house. I gave Malter money, and I presume he paid for them. I don't remember how much money. I don't know whether Malter made a record of it. We never used the burners

(Testimony of Alexander Stumpf)

out there. I don't know what became of them. I guess Malter has got them.

I did not tell Coates that Kerr was competent to build a still. I did not tell him Kerr was a dead shot. It was never mentioned in my presence. I never heard of his being a dead shot with a revolver. I never knew that. I told Coates that Kerr had been in the bootlegging business, and I felt sure after talking to him that we could trust him. Kerr had told me that he had been in the bootlegging business. He said he was handling, peddling small bottles. Kerr worked for me about 30 days. He was to get \$5 a day. I paid him in full. Besides Andreas and Kerr, a man was working out at Caruthers, named Cannon. He was supposed to live on the place and take the lease of the ranch. He was the man that actually took the lease. I told him what I wanted the business for, and he said all right. I was to pay him \$5 a day until the plot started to going; and then I was to pay him \$10. I told Coates I had abandoned the Caruthers deal. I looked for another location, and told Coates I had found it. The things were brought in from Caruthers before the Foss contract was signed. I told Coates about the Foss ranch some time in December. We took him up there and showed him what was up there. Malter was with us. That was after the Foss deed was signed. The tanks and all were set up at the time that Coates first went to the Foss Ranch. The mash was in. I showed Coates the still some time in December. To my knowledge, from September clear through to December Coates had never had a look at the still, and yet he was down at the Malter place almost daily. He lived out there for awhile with Malter.

(Testimony of Alexander Stumpf)

But neither Malter nor myself ever told Coates that the still that he was in on was right there in the Malter library. I didn't tell him it was there because I was afraid he might let it out. We trusted him but he done a lot of talking. We let Brix know where it was. We never told Coates at all about Olie Olson having anything to do with the still. I don't know whether Coates ever knew that Olie had anything to do with it.

When we moved off the Caruthers place Coates wanted an accounting of all this money, wanted to know how much money he had spent. I don't know the exact date of this. We had an accounting with him. Coates and Malter were there when this little yellow sheet was made. I got this little sheet off Malter's desk. He has a lot of sheets like that there. It was his own letterhead, his own letter stationery.

Q. Hugo Malter's?

A. Not Hugo's, but Malter                      , something like that.

Q. Who was

A. Stationery.

Q. Yes, but what was the business, Malter

THE COURT: Strike that out as immaterial.

MR. SAVAGE: Well, if the Court please, I am going to ask for an exception, unless—may I have the privilege to make the point on that? I want to show that this witness knew all about the syrup concentrate deal, put in evidence the Malter                      Syrup Concentrate deal.

THE COURT: The ruling is made.

Whereupon the defendant Coates, through his counsel, duly excepted to the ruling of the court.

(Testimony of Alexander Stumpf)

I never heard Malter mention in the presence of Coates the Malter business.

Q. What was that business?

A. I don't know. All I know is that it was a winery years ago.

THE COURT: That is the question that the Court just said is immaterial, is it not?

MR. SAVAGE: I did not so understand.

THE COURT: Is not that the identical question?

MR. SAVAGE: Oh, not at all.

THE COURT: What?

MR. SAVAGE: Not at all.

THE COURT: Well, it is the Court's view that it is the business of the Malter Moro Company, is it not, and that is your understanding of it, Mr. Savage, is it not?

MR. SAVAGE: I beg your pardon, I did not have that understanding. I wanted to know whether if he knew what the Malter Moro business was.

THE COURT: Well, that is precisely it. I said that I regarded that as immaterial a moment ago. Now, you are asking it again, aren't you? Strike it out.

MR. SAVAGE: Well, he has already testified that he never heard anything said about a grape concentrate business, and we know that this Malter Moro was a grape concentrate business, and I think it is perfectly proper, and I except to the ruling of the Court, and note an exception.

I don't know where Malter kept that statement of the expenditures in this conspiracy, whether he kept it in a drawer or in his pocket. I believe there was only one page of it, written in pencil on just one side. I don't remember the last time I saw the statement.



## (Testimony of Alexander Stumpf)

Either in October or November, Coates wanted to know what had been done with this money. I kind of called off what I could think of that was expended. I don't know what the amounts are at this time. One was \$375 for rent. I don't know the amount, but I paid it. It was for the Caruthers ranch. I gave an item of \$150 for light and power. There was a deposit on the place for light and power. I don't know how much. I don't remember. I told him I had spent \$100 for tanks. I don't remember what it all was. I wrote the items down on a card of this kind. I had an item of \$100 for a truck, and the water system was \$150, and the tanks were \$210, five of them. This was money that we had spent up to that time. We had never used any still up to that time. Gas and oil bill were for my automobile. I put down an item for \$50 for gas and oil.

I did not tell Coates that any of these expenditures went into a still. Then there is \$1250 for machinery.

At this point there was offered in evidence as Government Exhibit 4 the paper or instrument from which the witness was reading the figures already testified to. The offer was objected to by the defendant Coates, on the ground that no proper foundation had been laid therefor.

Thereupon, upon questions propounded by the Government, the witness stated that he saw defendant Coates make the memorandum of the items on the card or paper, on a similar card or paper; that he saw Coates write on a card at the Malter house. It was a card like the one offered in evidence.

By MR. McNABB: Q. Mr. Stumpf, did you see Mr. Coates make the memorandum of the items that are on that card, you have seen the card, or on a similar card?

(Testimony of Alexander Stumpf)

A. On a card of that kind, yes.

Q. And he took those down at whose suggestion, who was there?

A. At his own suggestion.

Q. At his own suggestion. And you saw him write those items on a card at that time, did you?

A. Yes, sir.

\* \* \* \* \*

Q. And on a card identically like that yellow card that you see there?

A. Yes, sir.

MR. McNABB: We offer it in evidence if the Court please.

THE COURT: Well, were they the same items or do you recall the items that are on that card now?

A. Yes, I believe they are the same items that were called for.

MR. SAVAGE: Well, I want to object to the admission of that in evidence, and also, to the method of examination of THIS witness at this time.

MR. McNABB: Well, you brought it out, Mr. Savage.

MR. SAVAGE: I had a perfect right to bring it out in cross-examination, because he said Coates said—

THE COURT: Proceed with the examination.

THE CLERK: Is that admitted, your Honor.

THE COURT: Yes.

MR. SAVAGE: Note an exception, please.

The item of \$1250 for machinery was so made because we never used the word “still”. Up to that time we had never told Coates that we had a still or were going to buy one or had an option on one. We never told him

(Testimony of Alexander Stumpf)

about a still. He knew that we had bought a still. We told him so. We had not bought a still. The \$1250 item was for copper for the still and for labor, and so on, for the building of it. I say that he knew that we had bought a still, that we bought a still. No, I do not say that he knew that we bought a still. We told Coates we bought a still because we did not want him to know that Olie Olson was building one.

Q. By MR. SAVAGE: Was there any other still mentioned?

A. Yes, sir.

Q. Which one?

A. The one that is over here.

Q. Why you just told me that you did not mention that, would not tell him about it.

A. It was mentioned up on the Foss ranch. He seen it up there.

Q. Well, you did not take it up on the Foss ranch until up along in December, and you told me this conversation took place in April.

A. It was for to buy copper and so on to build a still but we never told him, we told we had purchased the still some place.

I don't know whether I told him about how much copper had been bought.

I went up to the Foss ranch with Coates. I came out to Malter's house, and Malter and Coates were together. Coates said he would like to see that equipment once. I said all right, that we would go up. I don't remember the exact date. It was before Christmas. It was maybe 10 days after we bought the Foss ranch. The still was

(Testimony of Alexander Stumpf)

all set up there at that time. We went up at night, in my car.

We did not tell Coates that anybody else had any interest in the still at that time. The next time Coates went up with me, it was about a week later. He wanted to see the outfit again, see how it looked about that time. We came right back that time. On the way up and back we had conversation, but I don't remember what we talked about.

After that Coates took me up again one Saturday afternoon. At that time the still was not being operated. We had not yet started to operate it. Coates and I went into the barn and looked at the mash, and so on. I told him in a few days, or maybe tomorrow, we will start the pot.

I was up there again when Coates and Olson came up. Coates told me he was going to put a man in charge to run the place. I said I was dissatisfied and that I would give him everything. I told him that out on the G. H. Malter ranch. That was a day or so before he took Olson up. On that trip we took them into the barn and showed him everything. Cap Olson examined the mash; looked at the equipment. Olson said that as far as he could see, it was all right. He said that the still was all right and that everything was all right. When we went outside, Slim Kenney came up to me and said that the men wanted some money before they'd run the pot. Proctor was there.

I took a sample of the alcohol that was run. I stood there and watched it. Jim Proctor and Slim Kenney and myself ran it. I don't remember whether Olie Olson was



(Testimony of Alexander Stumpf)

there, or not. I told Kenney and Proctor that Coates was one of the parties. Coates was not there when I told them. I did not tell Coates the sum but told him they worked so many days at so much a day.

Q. What did Coates say about paying them?

A. He would run the stuff first and then have the money."

We got a very little alcohol, a little bottle full, a mayonnaise bottle full. I brought it down to Coates. It was alcohol. Coates drank some of the pure alcohol.

In January, after this trouble, I had a conversation with N. Lindsay South. I said to South that Coates was up there last night and released me off the ranch, and Coates is all blowed up now and the men want their money, and I says there is a hell of a squabble at that time. I says maybe you can put Coates, if we could at least get straightened up and quick, but as far as dead-shots and shooting anybody, there was never anything mentioned around. Lindsay South said he would see Coates about it. I saw South again on the following Monday morning, at his office. Mr. South knows practically the whole deal as well as I do.

After that I went to Frank Curran's office and asked Curran to make a demand for \$2380. I told Curran that the men have so much money coming, and I demand so much for my part. I says that it will be a tough time getting it, but we could write them a letter. He said "We might be able to scare him into it and have him pay up." I did not hear the letter dictated. Mr. Curran said that he would write the letter. That is all I know. I never saw a copy of it.

(Testimony of Alexander Stumpf)

I was born in Fresno, and lived here all my life; am 31 years old. The two crimes of which I was convicted, as I have testified, were the only crimes of which I have been convicted. Since my arrest I have spoken to officers of the Government. I have spoken to Mr. Ohannesian and Mr. Whitfield and other agents.

REDIRECT EXAMINATION

Q. By MR. McNABB: You testified that you introduced Mr. Coates to Kenney and Proctor, did you not?

A. Yes, sir.

Q. Now I will ask you what name you introduced Mr. Coates to Proctor and Kenney under.

MR. SAVAGE: Just a moment. I object to that as not proper redirect examination.

THE COURT: Overruled.

Whereupon the defendant Coates, through his counsel, then and there duly excepted to the ruling of the Court.

A. Why, I do not remember under what name, but he gave me some name to introduce him to Proctor and Kenney.

MR. SAVAGE: Just a moment. I ask that that answer be stricken out as the conclusion of the witness. If he wants to say what Coates said that would be conversation.

THE COURT: Overruled.

Whereupon the defendant Coates, through his counsel, then and there duly excepted to the ruling of the Court.

THE COURT: Did not introduce him under his own name?

A. No, I did not introduce him under his right name.

Q. BY THE COURT: You knew his right name?

(Testimony of Alexander Stumpf)

A. Yes, sir.

Q. BY MR. McNABB: Did you do that of your own volition, or did Mr. Coates ask you to do it?

A. Mr. Coates asked me to do that.

I pleaded guilty in this case some time ago. I pleaded guilty voluntarily.

Q. BY MR. McNABB: Has the Government offered you any inducement or immunity, or anything of that kind?

A. No, sir.

Q. BY MR. McNABB: By reason of your coming here to testify?

MR. CURRAN: Just a minute. I move that that answer go out until I can put in my objection.

THE COURT: It seems to me the presumption would be that everything *thing* was voluntary. And particularly with respect where the officers of the Government are concerned. It seems to me that would be immaterial at this time, and irrelevant and incompetent.

MR. CURRAN: Pardon me, your Honor. In all courtesy and deference to the Court, I want to take exception to your Honor's remarks that the presumption is that the plea would be voluntary and assign it as error prejudicial to the defendants.

THE COURT: Yes, you can have an exception to that.

MR. SAVAGE: On behalf of Mr. Coates, I want to ask for the same exception.

THE COURT: All proceedings under the law are deemed to be fair and regular.

(Testimony of A. J. Olson)

A. J. OLSON,

a witness called by the Government, after first being duly sworn, testified in substance as follows:

My name is A. J. Olson. I live in the vicinity of Fresno, and have lived here for 15 years. I am a brother of Olie Olson, the defendant in this case. I know Mr. Malter. I know defendant Brix. I met defendant Arkalian once. I don't know Kirkorian. The first time I saw Proctor was out in a room where I was waiting. I worked out with Proctor, but I never knew him, never knew that was him.

I met Brix about September, 1930. Malter was with him. I met him at my ranch. Malter introduced Brix to me and wanted to know where he could find a man to build a still. I think Malter asked the question. They were about three or four feet apart at the time. I saw Mr. Brix a week or ten days after that. Mr. Malter was with him at that time. I saw him in my yard. I had no conversation with him then.

When Malter asked me if I knew anyone who could build a still, Brix did not say anything.

I am acquainted with defendant Coates. I met him shortly before this case came up. I was introduced to him by Mr. Malter on my own place. I had not known Coates before that. There was no conversation that I know of on that occasion. I don't remember what they talked about at that time. I don't remember anything at all that I said to them or that they said to me on that occasion. Of course there was some talking but I could not recall what it was. I never saw Mr. Coates after that until the time I went up to the still. At that time he came to my



(Testimony of A. J. Olson)

house and nobody was with him. We went out and took a ride. On the road going up Coates said something to me. We were not talking much about the still. When we got up quite a ways he told me he was going to show it to me. He told me he was going to show me the still and see if he got "gypped" on it. There was nothing else said on the way going up. When we got there we met Mr. Stumpf. He took Coates and myself in the barn and showed us the whole apparatus, tanks, still, the boiler, and mash. Stumpf said to me, "Well what do you think of this still?" I said, "It might be all right if it was put up properly, but" I said, "it will never run that way." What was wrong with it was that it was set up backwards. The whole business more than any part of it was wrong. I saw about 2000 gallons of mash. The still was in the barn on the Foss ranch. I went up on a ladder and put my arm down in the tanks and I got some on my hands and took it out and tested it and it tested like syrup. I guess it was sugar and water. Stumpf said it hadn't been working good because it was too cold. Coates was there when this statement was made. Coates did not say much of anything because he did not know much about it. He said "Can you make anything out of that?" I said, "No." "Well, there is nothing but syrup and water, and that is all you have got." Coates said, "Do you think that still comes from Los Angeles?" I said, "I don't know." "Well," he said, "Stumpf told me he got it in Los Angeles." He told me he paid \$2000.00. Nothing else was said at that time.

Stumpf came outside and an automobile tooted the horn and Mr. Stumpf went out and left us in a dark room in

(Testimony of A. J. Olson)

there and we stayed there for ten or fifteen minutes. We thought there was something up so we sneaked around and found doors and crawled through the hog pen and got out of there. I mean myself and Coates. We crawled over the fence and went up to the house. We went up to the house and something was said about something to eat. We had a bit and walked out to the gate and met Stumpf and then we walked out over the hill to the spring, and they were talking on the road and I was bringing up the rear a little bit. When they got to the spring there they had an argument. I don't know what they were talking about. They got into a battle royal. Then we started back. They came on back to the house and Stumpf asked Coates for more money. He said, "To hell with you, you don't get any more." So then Stumpf says, "Out she goes," and "Let her go" Coates says. I don't know what he referred to by "out she goes." Stumpf said that to Coates. I did not hear Kenney or Proctor or anybody else say anything at that time in connection with the still.

I know defendant Arkalian. I just met him the one time that he came to my house. Mr. Coates was with him. That was in February 1931. They came together and I had a little conversation with them in the yard. Coates said "I thought I was the only one in this game." I think that is what he said. Arkalian said that Stumpf was a rat, I believe.

#### CROSS-EXAMINATION

Of course if you run a still you had to make your own mash before you made the alcohol. I ran my arm down into this stuff and the most you could make out of it in the light of your experience was a little syrup. Mash is

(Testimony of E. Pusey Cain)

only a name. This mash was all sugar and water. In addition to this, if they were going to make whiskey they should have put corn in it and if they were going to make brandy they should have ground up some grapes and let it ferment. When it contains three or four per cent you get low grade stuff.

### REDIRECT EXAMINATION

I have talked to various people about this case. I talked to Mr. Lindsay South, the attorney, about it and I talked to Mr. Savage, attorney for defendant Coates about it. They wanted to know if there was any alcoholic content in that sugar and water—that mash—and I told them no. That's all that was said.

### E. PUSEY CAIN,

a witness on behalf of the Government, being called and sworn, testified in substance as follows:

My full name is E. Pusey Cain. I live on Peach Avenue, Fresno, California, have a ranch out there. I never made a lease on that ranch or negotiated for it with Mr. Hugo Malter or Mr. Stumpf. I got some tanks from Hugo Malter in October 1930. I did not haul these tanks to my ranch. I think a Japanese by the name of Hatta hauled them. I made an agreement with Hugo Malter for some tanks. He said, "I will get you some tanks." There were lots of them on the St. George but most of them were in use. I had been there for seventeen years. I have three, four tanks there at present. Originally I had seven or eight. I had control over them and thought they were all coming to me. Part of one is there yet. The others were hauled away in October or November by the

(Testimony of E. Pusey Cain)

Japanese and a white man whose name I do not know. I had no conversation with Stumpf or Malter regarding a still or leasing my property for the use of a still.

### CROSS-EXAMINATION

One time Mr. Malter brought Mr. Coates around there. He and Coates and Stumpf. Malter and Coates and Stumpf were there. They looked around the grape concentrate plant I had there. I was introduced to Coates that day. I showed him around my plant. I was actually constructing a plant at that time for grape concentrate. This was not anywhere near the Malter place. I had an arrangement with Mr. Malter about furnishing him this for the grape concentrate plant. It was just a verbal agreement at that time. The agreement was to supply him with some tanks. He was to have no interest in the grape concentrate plant. I was going to put that up for the plant. The idea was that when these people came over they came over to buy a syrup plant that I was constructing the tanks for. I have operated a grape syrup plant since last October. Before that I was employed at the G. H. Malter place for about sixteen years. There was a grape syrup plant there. I ran that place. The tanks were the kind used for receiving grapes in grape concentrate plants. They were different sizes and shapes. I saw Coates over at the Malter place. There is a still in the grape concentrate plant at the Malter place. It is about four feet high. I bought that still. I never heard at any time any statement made by Stumpf, Malter or by Coates about Coates being interested in a still. I never heard Coates or Malter or Stumpf say anything about manufacturing alcohol. I heard them say something about



(Testimony of Wilbert G. Whitfield)

being interested in the manufacture or sale and distribution of grape syrup concentrate. Malter was engaged in selling concentrate. He bought some from me, and that was when he had a store on Merced Street.

WILBERT G. WHITFIELD,

a witness on behalf of the Government, after being called and sworn, testified in substance as follows:

My full name is Wilbert G. Whitfield. I am a Federal Prohibition agent. I held that position in Fresno in 1930. I was at the Foss ranch. Agent Clements and a special agent by the name of Graff were with me. I saw tanks and vats at that place. We took nothing from the vats, but I took a sample of half a gallon bottle of mash from the gravity tanks that was at the still location in the barn. I took it into my custody and took it back to the evidence room, to the Bureau of Prohibition. I retained possession and control of it since then. I gave it to Government chemist named Stribling. That is identical. Identical stuff that I took from the Foss ranch at the time I referred to. Nobody else had any possession or control over that after I took it from that time on until I gave it to Mr. Stribling, the Federal chemist. It has been in my possession and control from the time I seized it up to the present time. I took the sample and have had it in my possession ever since. This ferments after you get it and hold it. It was tested shortly after I got it in my possession. The date I turned it over is on the bottle. It was shortly after I got it, within a few days. When I got this sample from the tank on the Foss ranch the ranch was deserted with the exception of some Forest Rangers.

(Testimony of Fred D. Stribling)

It was practically deserted with the exception of some Forest Rangers who were patrolling there for fire. There was nobody on the ranch. I have no idea who put this liquid into that tank container that I took it from.

Whereupon the bottle of liquid mash was offered in evidence as an exhibit by the Government.

The offer was objected to on the ground that it was too remote, not connected with the defendants and not shown who put the liquid mash into the tank receptacle.

The objection was overruled by the court, whereupon the defendant Coates, through his counsel, then and there duly excepted to the ruling.

The bottle of liquid mash was thereupon introduced in evidence as Government's Exhibit 6.

#### FRED D. STRIBLING,

a witness on behalf of the Government, after being called and sworn, testified in substance as follows:

My name is Fred D. Stribling. I am a chemist. I have been in this line of work since 1921, I mean with the Government, this work. I have had this, Government Exhibit 6, in my possession before. I received it indirectly from Mr. Whitfield. He told me that there was some mash he wanted tested. I tested it. I found it to be mash containing 3.24 per cent alcohol by volume.

#### CROSS-EXAMINATION

I received the sample some time before April 17th. I failed to put the day on here. It might have been a week before. It was while I was here attending court. Mr. Whitfield told me he just received a sample, just brought it in. I made the test some time prior to April 17th.

(Testimony of Ferdinand Andreas)

Liquid like that, such as you have in that exhibit, changes from time to time, according to the conditions that surround it. It depends upon conditions and the amount of sugar present whether the alcoholic content would increase during a period of some months. It was fairly warm in the month of April. That would have something to do with the alcoholic content, provided there was enough sugar. I cannot tell from my examination of this specimen what the alcoholic content of this liquid was in the month of January 1931. I cannot tell what the alcoholic content was in the month of February 1931.

Whereupon the defendant Coates, through his counsel, by motion applied to the court for an order striking from the record all of the testimony of the witness Stribling upon the ground that the testimony was at variance with the allegations of the indictment, in that the charge against the defendant was conspiracy to possess and manufacture a still and not conspiracy to manufacture liquor, and that any evidence concerning the possession of liquor or manufacturing of liquor or alcohol was irrelevant and immaterial.

The court denied the motion, whereupon the defendant Coates, through his counsel, then and there duly excepted to such ruling.

FERDINAND ANDREAS,

a witness called on behalf of the Government, after being duly sworn, testified in substance as follows:

My name is Ferdinand Andreas. I live at Salinas. I went over there last October and stayed there until June. Then I moved back to Fresno for a couple of weeks and

(Testimony of Ferdinand Andreas)

I went back up there again. Prior to living in Salinas I lived in Fresno. I was born and raised in Fresno. At one time I was employed by Mr. Coates, one of the defendants in this case. I see Mr. Coates in the court room. I think I went to work for Coates in March 1930. I worked at a filling station, gas and oil, as a salesman. I worked there I think until September 1930. In September he put me on a different job. He asked me if I wanted to work for \$5.00 a day and I told him I did. Before that I had been getting \$90.00 a month. He said he was going to buy a Chevrolet truck and wanted me to drive it. I accepted the change from the station job to the truck driving job. I got a Chevrolet truck.

The next day he and Mr. Malter and Mr. Stumpf came out and they gave me a receipt for \$100 payment on the truck. They said the Chevrolet truck would be out that night. They told me that it would be out that night so they brought it all right and I signed a contract in the office there by Mr. Coates. They had the truck put in my name. They said they were going to start up a syrup plant and they wanted me to haul some stuff for them. They gave me no explanation as to why they put the truck in my name. I never asked why. I thereupon began driving the truck. Coates told me to take orders from Malter and Stumpf and if there was any come back, or if there was anything wrong that I didn't like I should come back and let him know because I was his employee. After that I worked driving the truck. The truck was kept at my place. I didn't work at the service station any more but I went over to fill gasoline and oil whenever it was needed. I did not pay for the gasoline and oil when I got it. Mr.



(Testimony of Ferdinand Andreas)

Stumpf was supposed to pay that bill. The first thing I did with the truck was that I went out and cut some alfalfa for turkeys and fed them. After that I hauled some pipe, we pulled out of a fellow's place and hauled it over to another place out here east of Fresno. I hauled some pipe and there was a motor. I hauled it out to the ranch I think it was the Kane place.

My next haul was some brick from a brick yard over to Mr. Kane's place. My next job was to haul some posts and some larger timber and some lumber, and some lumber barrel staves. I hauled that from a warehouse here south of Fresno. I think that is all I hauled over to the Kane place. They told me to go out to Caruthers and clean out a place out there. There were a couple more men there besides me. They were Mr. Cannon and Mr. Kerr. I found them on the place when I got there. Cannon moved his stuff out there with some lumber. I moved it. I took some lumber out there and I think there were some turkeys we hauled out there, a few turkeys. I hauled some nails out there and hammers and some black paper, two rolls of it. We worked there cleaning out the barn and leveling a place in the barn.

At this point the defendant Coates, through his counsel, objected to further evidence as incompetent, irrelevant and immaterial and not within the allegations of the indictment, there being no charge in the indictment that anything was done at Caruthers. The objection was by the court overruled, to which ruling the defendant Coates, through his counsel, then and there duly excepted.

While I was on the ranch at Caruthers some men came and looked in the barn. After this Stumpf came out and

(Testimony of Ferdinand Andreas)

he and Cannon and Kerr had some kind of a deal there together. I was there in the house when they made some kind of an offer. Stumpf offered Cannon \$10 a day if he would stay and he said he was not going to stay there, and he offered him \$20 a day and he would not stay. That was right after the men came and looked in the barn. I reported that to Coates when I saw him. He told me to go back out there and stay until somebody came. Nobody did come out. Stumpf was supposed to come out there but he did not come out there. I went back to Fresno again. Right after that Kerr and Cannon packed up their stuff and left and after they left I stayed out there a while and went back to Fresno and went over to Mr. Coates and told him about it. After that I moved the stuff away from there. It was that night, the same night. I was told to go home. Coates told me that. Coates and Malter told me that if Stumpf would not come out there to go back to Fresno so I went over to Coates and told him that those fellows had left. While I was in the office of Coates, Malter and Stumpf drove up and asked me what I was doing. I told them I had come in, there was nobody out there and I was not going to stay out there alone so Coates and Malter and Stumpf told me I should go home. I went home. That night about twelve o'clock Coates and Malter came over and woke me up and told me to come out and move all that stuff back in the Malter garage.

A. Well, Mr. Coates knocked at the window and called my name and then I got up and looked out of the door, and he told me what to do, and I went out and I think the first two loads we hauled in, I think there were four loads we hauled in. The first two loads, by brother-in-law

(Testimony of Ferdinand Andreas)

helped me. It was heavy stuff \* \* one man could hardly handle it.

Then I came to the office and told Coates I was quitting, I did not like the job and he transferred me to Salinas where he had a service station. He did not continue my wages at \$5 a day but gave me \$100 a month. I assigned the truck to them before I left, in Mr. Coates' office making payments on it. It was his. I signed it over on the bottom of the contract and gave him a \$100 receipt.

In June 1931 I had a conversation with defendant Coates at Salinas about the truck. He had an affidavit which showed on there that I would sign it over in full power of the lawyer to go and get the pink slip for the truck. The lawyer was Mr. Lindsay South.

Q. What was said by Mr. Coates about your signing this affidavit?

To this question the defendant Coates, through his counsel, objected on the ground the same was irrelevant, incompetent and immaterial, and on the ground that the affidavit had not been produced or shown to the witness.

The objection was by the court overruled, to which ruling the defendant Coates, through his counsel, then and there duly excepted.

A. Well he wouldn't give me my pay check unless I signed that affidavit. So me and him—him and I—we drove down town, we tried to get a notary public's office, he wasn't around then, so we gave a check to his manager and told me to come in the morning to have it signed. I did. After I signed it the manager took it and gave me my check. I have not seen it since.

(Testimony of Ferdinand Andreas)

Whereupon the defendant Coates, through his counsel by motion, asked for an order striking the answer of the witness from the record on the ground it was incompetent, irrelevant and immaterial. The motion was by the court denied, to which ruling the defendant Coates, through his counsel, then and there duly excepted.

Q. Do you know Mr. Andreas why the truck was put in your name?

To which question the defendant Coates, through his counsel, objected on the ground that it called for the conclusion of the witness on a matter which would be impossible for him to know. The objection was by the court overruled, to which the defendant Coates, through his counsel, then and there duly excepted.

A. Why, I think they said they were going to put up a syrup plant and wanted me to haul the stuff out.

#### CROSS-EXAMINATION

Coates, Stumpf and Malter told me they were going to put up a "syrup plant." I was discharged by Mr. Coates about June 11th or 15th.

Q. That was about the time he insisted that you transfer the pink slip on this truck to him, is that correct?

A. Yes, sir.

Q. And you refused to so do?

A. No, I didn't.

Q. You had already been notified that he wouldn't need your services any more?

A. Oh, yes.

There was some litigation about the three Salinas service stations that Coates was operating. He had told me that he was going to put me in charge and let me take care of



(Testimony of W. G. Walsh)

the business over there and handle it and make me the Salinas manager. That was after the manager got fired. He put me in charge temporarily. I had complete control of Coates' funds, actually collected the payments and banked the money. After Coates discharged me I did not go into the gasoline business in competition with Coates right away. I was working over in Hollister for two months before that, and I moved to Fresno, and I was called up by this man that was the first manager for Mr. Coates—the man that Mr. Coates first fired. His name was Burton. The affidavit that Coates wanted me to sign was a paper with reference to the title to the truck. It had nothing to do with anything else. I am working now for Mr. Burton in a gas station in Salinas. I did not sign a pink slip. I signed a contract—a release for the truck. I had nothing to do with it any more. It belonged to Coates.

W. G. WALSH,

a witness called on behalf of the Government, after being duly sworn, testified in substance as follows:

My name is W. G. Walsh. I reside at 3243 Kerckhoff Street, Fresno, and I am in the truck business. I was engaged in such business during September, October and November 1930. During the month of September or October 1930 I sold a truck to Andreas but not to Coates. Coates and Andreas contracted for the truck and the contract was made in the name of Andreas. I don't think it was put in the name of Andreas at the suggestion of any one. Coates called me and said he had a boy working for him that wanted to buy a truck and he brought the boy down there. The contract was made at that time. Malter

(Testimony of Arnold C. Franzke)

and Stumpf were not at my place of business at the time. I have a copy of the conditional contract of sale for the truck, Andreas signed the contract. Andreas was there two different times. First he looked at the truck and later the contract was signed. Prior to either visit Coates called me on the telephone and said he wanted to buy a truck for Andreas. I am sure I did not see Stumpf or Malter. I don't know Malter. At the time the contract was signed the first payment on the truck of \$100 was made. If I recall it correctly Coates made the payment.

At this point the conditional contract of sale covering the truck was offered and admitted in evidence as Government's Exhibit No. 7.

ARNOLD C. FRANZKE,

called as a witness on behalf of the Government, after being duly sworn, testified in substance as follows:

My name is Arnold C. Franzke. I am engaged in the automobile financing business and was in that business during September, October, November and December 1930, and in January and February 1931. I know the defendant D. Arkalian. I know defendant Alexander Stumpf. Stumpf and Arkalian came to my office to borrow some money on an automobile. Arkalian wanted to borrow \$1500. I told Stumpf and Arkalian to make out an application and to call again the next day. The application was made out. It was Arkalian who wanted to borrow the money but Stumpf was with him. After looking the automobiles over and checking them we found that we had to have more security and offered them \$1200 instead of \$1500. They said \$1200 would not be sufficient for their purposes and after further conversation they left without making any loan. That is all there was to it.

(Testimony of E. L. Kenney)

E. L. KENNEY,

a witness called on behalf of the Government, after being duly sworn, testified in substance as follows:

My name is E. L. Kenney. I reside in Reedley and Fresno. At the present time I am confined in the Fresno County jail. The jail is here in Fresno, but I have been in the jail at Visalia. It was for violation of the National Prohibition Act. I am forty-one years of age. I have lived in Fresno on and off for thirty years. I am a married man and have a family. I have previously pleaded guilty in this case. I know Alexander Stumpf. I know D. Arkalian. I have seen defendant Coates two or three times, that is all. I know who he is. He is one of the gentlemen sitting over here in the court room. I don't know defendant Brix. I know defendant Olson. I have known Stumpf four or five years. I have been employed by Stumpf. I secured employment from him in the year 1930, a little after the first of December, about the 9th or 10th I imagine. Stumpf came to Reedley to see me all alone. I know G. H. Malter by sight. When Stumpf came out to see me he wanted to know if I would be interested in working at an alcohol still. I told him I would think it over. Subsequently I met him, about a week later, in Fresno. He was all alone, and so was I. He said that he was getting everything ready and he was about to start this proposition. I told him I would do it. At that time he did not tell me where it was located. He agreed at that time to pay me \$10 a day. I was to get \$10 a day for working on the job. If I went to jail I got \$5 a day for every day that I was in jail. At that time he did not tell

(Testimony of E. L. Kenney)

me where I was going to work. I was to go to work when we went to the place. We did not go to the place that day. I next saw him probably ten days before I went up to the job. He came and got me at that time. At that time Howard Foss and his wife were with us. We picked them up on the way starting up there. The four of us went up together. We went to a ranch up near Auberry. It is known as the Foss ranch. When we got there there was no equipment there for a still or anything of that kind. On the place we found Jim Proctor. There was no conversation there that day with reference to the still. I remained there that day and Proctor also remained. The Fosses came back with Stumpf. Stumpf came right back up and we started going to work. The day after we got there we went out looking for location, looking for water, to see how the water was around there. We looked all over the place. We had trouble getting water and we finally decided to put the still in the barn. There was some hay in the barn. We cleaned it all out of one end put it in the other end. We cleaned out the end of the barn and there was twelve or fifteen barrels there. We repaired them and filled them full of water and put the mash on in them. There was no still there at that time. We started the mash right away. Stumpf directed the fixing of the mash. Proctor, Stumpf and myself prepared the mash. There was no sugar on the ranch when we went there. I brought it, the sugar there. I had come down from the valley in an automobile. Stumpf gave me the automobile. I hauled sugar up there. I hauled 47 sacks all told. I made about three trips. Stumpf hauled the yeast. I picked it up six or seven



(Testimony of E. L. Kenney)

miles—I went out Tulare Street. There is a Japanese living on the place. I picked it up there. I believe the name of the Japanese is Hata. It was his place. Before that Stumpf and myself and the Jap got the sugar here in town out of a warehouse on the state highway in Fresno. I have since learned that the man who delivered the sugar to us was Kirkorian. It was his place where we got the sugar.

About a month after I first went up to the Foss ranch the distilling apparatus was hauled up there. I hauled part of it and Stumpf hauled part of it. I hauled the base of the still and the column and Stumpf hauled the condenser up.

I am absolutely positive these (referring to proposed exhibits in court room) are a part of the still that was on the Foss ranch.

At this point the Government offered in evidence proposed Government Exhibits 1, 2 and 3.

The offer was objected to by the defendants as (1) incompetent, irrelevant and immaterial; (2) that no foundation had been laid, and (3) that there was no evidence of any connection between the defendants and the objects offered as exhibits in the case.

THE COURT: It is admitted under the qualification heretofore announced with respect to the participation of the alleged conspirators. Any other objections? Overruled. \* \* \*

MR. SAVAGE: May we note an exception, too.

Thereupon the offer was received in evidence as Government Exhibit No. 1, Government Exhibit No. 2, and Government Exhibit No. 3.

(Testimony of E. L. Kenney)

I said that I had seen defendant Coates two or three times. I saw Coates at the Foss ranch twice. I heard a conversation between Coates and Stumpf with reference to paying the salaries of myself and Proctor. It was February 9th or 10th some place along in there, the 11th or the 12th. It was in an automobile out close to the Nielson Apartments, here in town. Stumpf and Coates were present at that time. I had seen Coates up at the Foss ranch prior to that time. Stumpf and I went out there to find out about getting money to pay Proctor and myself. Stumpf wanted me to ask Coates about the wages and I told him no. I said, "That is your place to do that." I said, "I went to work for you." When we got out there Stumpf asked him about it and Coates said, "I refuse to pay anything off." He said, "I put money into this deal and have never got any money back out of it." He said, "in fact Mr. Stumpf I gave you \$3000. Mr. Malter gave you \$3000, and I refuse to put any more money in the deal. In regard to paying these men off the only way I know that they will get their money is to go ahead and run the stuff off and sell the stuff."

The first time I saw Coates at the Foss ranch Stumpf was with him. He came one evening after dark. I was introduced to Coates. I did not recognize him. It was about the first of February. Coates was introduced to me under the name of Brown. I was not with Coates and Stumpf all the time they were at the Foss ranch. They went out of the house for about a half hour and I was not with them. They came back before they left. I also saw Coates at the Foss ranch with Cap Olson. That was about February 10th or 11th. I saw them part of the

(Testimony of E. L. Kenney)

time. They went down and went in the barn. I was in the house all the time. I saw Coates and Cap Olson go down and go into the barn. I don't remember how long they stayed in the barn. I don't think I seen them come out. They were in there possibly half an hour. While they were in the barn and while myself, Proctor and Stumpf were present in the house Stumpf said, "I am going to get out from this deal. They don't seem to be satisfied with what I am doing here. This is your new boss coming up. I am through. If you fellows want to work any more, you can go ahead and work. If you don't you can quit." This conversation at the Foss ranch was around about possibly three or four in the afternoon and the conversation that I have related between Stumpf and myself and Coates here in Fresno was probably about five or six hours after that on the same day. I came down from the mountains with Mr. Stumpf. Coates and Olson had come down ahead of us. We had asked Stumpf for our wages several times. He said the fellow who was supposed to pay was gone to San Francisco. He was coming back. He made a trip down from the Foss ranch to get money for us. We saw him when he got back. He "stalled" and he was evasive, he would say he would be back the next day, or the second day. He said he didn't get it at that time. On the last day that he was up he offered us \$30.30. He said "That is all the money I got." We declined to take it. Olie Olson wasn't there the last time they came up. The still was built and we tore it down and rebuilt it. It was still up. When Coates and Olson came up the still had been tested and a run made on it but we tried to run it and it wouldn't run. We made

(Testimony of E. L. Kenney)

an effort to run it. We did not get very much alcohol, about a gallon. That is the only time I knew of its ever having been steamed up while I was there. The matter with it was that the mash wasn't in shape to run for one thing, and then it leaked, it leaked all over. Olie Olson was there at that time. It was torn down and a new condenser made. We all helped to make it. Olson was the mechanic.

I remember Coates eating at the house the last time he was up there. He came to the house and said he was hungry. Of the alcohol we manufactured from the still Stumpf brought a sample down to Fresno and left the remainder—a little bit—there. Olson was employed on the ranch working on the still around 5 or 6 weeks. During the progress of the work, I saw D. Arkalian there. He came with Kirkorian. Once when Arkalian and Kirkorian were there, they were at the house and another time they were there Stumpf sent me up to the mountains and told me to keep out of sight, to lay low. He didn't want them to see me.

#### CROSS-EXAMINATION

I knew Stumpf about five years. I had business with him before this transaction. The business was selling liquor. I bought liquor from him.

The first time Coates came up to the Foss ranch it was just after dark. Stumpf came with him. Malter was not there at that time. I know he was not there. I went out to the car and took some things out of it. When Coates drove up Malter was not in the car. I seen him when he left. He was not in the car when they drove up. I don't know whether Coates went to the barn on that



(Testimony of E. L. Kenney)

trip or not. Coates made no talk. Nothing was said. He and Stumpf came into the house and Stumpf introduced him as Brown and then they went outside. Outside of shaking hands with him and meeting him I had no conversation. Proctor was there. I had seen Coates before but did not know him. I had seen him at his filling station. He came again a few days afterwards, this time with Cap Olson. They went down and went inside the barn and were there for about a half hour. I did not see them come out. Stumpf said, "Boys, this is your new boss. I am through. \* \*" I don't know whether he referred directly to Mr. Coates or Mr. Olson, but I believe it was Mr. Coates. Mr. Coates gave me no money at any time. I didn't demand any money from Coates. I heard no conversation between Stumpf, Olson and Coates referring to any business. After Coates and Olson left Stumpf said, "I will go down and get the money." I told him, "No". I said, "Mr. Stumpf you fooled us too many times. I am going with you." Stumpf had fooled us several times about the money. He agreed to bring it to us. We were not going to trust Stumpf at all so I went with Stumpf. We did not overtake Coates and Olson. I was with Stumpf before going to Coates' house. On the way down an argument came up between me and Stumpf. Stumpf wanted me to ask Coates for the money. He told me he thought I could get it, it would be better if I went to ask him. He said, "I think there will be a better chance if you ask him." I told him I would not ask anyone for the money. I told him I didn't know whether Coates owed me this money or not. He hemmed and hawed around and he said,

(Testimony of E. L. Kenney)

"Now, when you go out there and see this man, don't let him talk about anything else. If he starts to say anything else you tell him to stop. Don't talk about anything else. Don't let him talk about anything else." I agreed with the plan in order to get him to take me to this man. Nothing was said about my getting hard boiled. We drove over in front of Coates' house. We did not go in. The conversation started with Mr. Coates on the outside and I think Stumpf invited him into the car to sit down. Stumpf said to him, "How about paying these men off?" Coates said, "I am all through. You delusioned me on this deal up there. You told me that you paid \$1200 for this still and paid \$200 to have it hauled up from Los Angeles. I have found out since that you made this still out at Malter's." The first thing I knew Coates was swearing at Stumpf. They had quite a set to over the deal. Stumpf kept pushing me in the ribs all the time. He had told me "If he talks about anything else you stop him right up." But I refused to stop him. I let him talk until he started in on me. He says to me, "You two fellows, did you work for Stumpf over at Gilroy and run a still over there?" I didn't answer the question, and then Coates started in swearing at me. I told him, "Mr. Coates, listen, all I am trying to do is get my money out of this. Don't cuss me like that because you can't cuss me." Stumpf told him out there, "If you don't pay these men off they are going to bring suit against me, and you know what that means." I believe Stumpf told Coates that. I talked to Proctor afterwards about this conference. When I went back up there I told Proctor what I could find out that Stumpf had got the

(Testimony of James Proctor)

money away from these fellows and was gypping them. I explained to him what Coates had said. At that time Stumpf admitted to Coates that Coates had given him \$3000 and Hugo Malter had given him \$3000, and he accused Stumpf of taking that money and furnishing the house and buying the place where he lives. I had many conversations with Stumpf but I have never spoken a word to him since the indictment. Up to the time I was down at Coates' house with Stumpf I didn't know that Stumpf had received any money from Coates.

I know Hugo Malter. I haven't talked to the Government. I talked to the agent either before or right after the indictment. Mr. Whitfield was the agent representing the Government. The conversation was at the county jail here in Fresno. That was not in connection with this case at that time. I have been convicted of a felony. At the Foss ranch on his last night Coates said, "The only way these boys can get their money out of this deal is to go ahead and run that stuff off up there and get their money out of that." He further said, "I am all through, I am not going to put any more money on this deal. I have found out that you gypped me."

### JAMES PROCTOR,

a witness called on behalf of the Government, after being first duly sworn, testified in substance as follows:

That his name is James Proctor; that he resides at Shaver Lake, Fresno County; that he had lived there all summer; that he knew Stumpf, first becoming acquainted with him the preceding December; that he knew Foss for four or five years; that he knew Kenney since last

(Testimony of James Proctor)

December; that he had met defendant Coates twice at the Foss ranch; had been introduced to Coates as Mr. Brown in last January; that he was present when Foss came to the Foss ranch; had been staying at the ranch about a year working for Mr. Foss; at the time Foss came Stumpf was with him and also Kenney and Foss's wife; that he heard no conversation between these people; that he heard Foss say he had leased the ranch to Stumpf and that he thought Stumpf wanted to hire the witness to work for him and stay on the ranch; that this was about the 9th of December 1930; that these people did not return to the ranch but that Foss's wife came again in February. At that time she came alone; that Stumpf had called at the ranch again; was staying there part of the time, most of the time; Kenney also stayed there; that the witness went to work prospecting for water, working at the spring and cleaning out the well; that there were some barrels there and some water tanks; they were not brought up there but were there already.

Stumpf told me he was going to put up a still and wanted me to work for him. Soon after that he brought some things and we went to putting them up. Kenney and Stumpf helped me. Soon after that a man named Olie Olson came to the Foss ranch. He went to work on the still. That is the still that is in the court room here. Myself and Kenney and Foss and Olson went to work on the still. I also cut some wood; also made some changes in the buildings.

During the time I was there I met men named Coates, Arkalian and Kirkorian. I met them at the ranch there. I first met Arkalian. When Coates came he was by



(Testimony of James Proctor)

himself. I had no conversation with him. I heard no conversation between him and anyone. Stumpf introduced him as Mr. Brown. Kenney was present. I heard no conversation between any of these men at that time. Stumpf promised to pay me \$8 a day and board. He never paid me anything. He said he could not raise money to pay me. While I was on the ranch Stumpf brought groceries. I don't think Coates brought any. Coates was not along with Stumpf. I did most of the cooking at the ranch. Coates ate lunch there one afternoon. Olson was with him. I heard no conversation between him and anyone. Coates was outside talking with Stumpf. They went into the barn. After Coates left Stumpf wanted to dump out the mash and hide the still. I told him to leave it there until they paid me my wages and then he could do what he pleased with it. Right after that he said he would get my money. He came back after that. He then referred to Coates. He said Coates was supposed to furnish the money to pay us.

Q. Was there something said by Stumpf at that time in connection with the purchase of the plant? Being in escrow, or escrow or anything of that sort?

The defendant Coates, through his counsel, objected to the question on the ground it was leading and suggestive. The objection was overruled by the court.

A. When Mr. Coates come, Mr. Stumpf come in ahead of him and said that he turned everything over to Mr. Coates.

Kenney was present at the time.

Q. Did he make any reference to Kirkorian or Arkalian at that time? A. No.

(Testimony of James Proctor)

Q. Well now think that over carefully. I wish you would look at this statement here for the purpose of refreshing your memory.

MR. LINDSAY: If your Honor please, I object to showing him that.

MR. DAVIS: Wait until I get through with the question.

Q. I ask you first if this is your signature?

MR. LINDSAY: Are you taken by surprise, counsel?

MR. DAVIS: Well I don't think it is necessary to be taken by surprise the way I am presenting this matter. I am only referring to a document and asking him if he signed it and asking that he use it for the purpose of refreshing his memory.

MR. LINDSAY: Object to the witness being given any memorandum to refresh his memory, unless it appears the memorandum made by the witness himself or under his direction. That I understand to be the rule.

Whereupon the objection was by the court overruled, to which ruling the defendant Coates, through his counsel, then and there duly excepted.

Q. By MR. DAVIS: Did you sign that (referring to the statement handed to witness by counsel for the Government for the purpose of refreshing the memory of the defendant)? Your answer please?

A. Yes.

A. Yes. Stumpf said that Coates and Kirkorian and Arkalian were going to buy this and he was stepping out of it and he said "If you want to work for them you can go ahead and work for them."

Stumpf talked to me about moving the plant in Kenney's presence at the Foss ranch. He wanted to dump the mash and hide the still. I made an objection and protest. I told him to leave it alone until he paid me for my work.

(Testimony of James Proctor)

### CROSS-EXAMINATION

I never heard any conversation about forcing Coates to pay this labor bill. I told Stumpf at different times that I was going to stay and watch that still and that nobody was going to move it or touch it until they paid me. I told him I was armed and I intended to stay so until I got my money. I had guns in the house.

I was up there at the time the still disappeared. I can't give you the dates when it disappeared, it was about the middle of February. I did not hear and I did not know who moved it. It was moved in the night time. Kenney gave me a report about Stumpf and himself meeting Coates down in Fresno about money. He said that he heard Coates tell Stumpf down here that he gave him \$3000 and that he was a double-crossing son-of-a-bitch. Mr. Kenney told me that he heard Coates say he gave Stumpf \$3000 and that Coates told Stumpf that he was a double-crossing son-of-a-bitch. I think Kenney also told me that Coates wouldn't do anything. Kenney told me that Stumpf was going to attach Coates' trucks down there.

Q. Did you ever hear any talk on the Foss ranch in the presence of Mr. Coates or Mr. Olson where anything was mentioned about the operation of the still or the engaging in the manufacturing or sale of alcohol.

A. No.

I made a statement in writing signed by me to two representatives of the United States Government about this case. I made the statement in Fresno. It was on Fresno Street where Howard Foss works. The two men that I made the statement to were representatives of the

(Testimony of Walter G. Kerr)

Government. I don't know their name. Whitfield was not one of them. I can't say whether Dibble was or not.

(By colloquy between court and counsel and by reference to an instrument in writing it was agreed that the two Government representatives were Clements and Panel.)

They asked me if I would make a statement. They said they were after Stumpf. The Government officers made no statement which would lead me to believe that I would not be prosecuted. I did not request that the case be dismissed. I did not talk to anyone in substance to the fact that if the case were dismissed against me that I would freely testify. I did not know that the case would be dismissed against me until I sat in court.

WALTER G. KERR,

a witness called on behalf of the Government, after being duly sworn, testified in substance as follows:

That his full name was Walter G. Kerr, and that he resided at 2331 Thomas Avenue in the City of Fresno and had resided in the City of Fresno since 1913; that he knew Alexander Stumpf; that he had met Coates; that he knew Malter; that he did not know Kirkorian.

Sometime last fall I became acquainted with Stumpf. About the 9th of September I met Malter and he asked me if I would like to go to work. That afternoon he introduced me to Stumpf. This was in the Fresno Auditorium. I was to go to work for them at \$10 a day and expenses. At that time the work was to be carpenter work, repair work. They didn't say exactly what. I went to work for them on the 12th. I went out to the Malter



(Testimony of Walter G. Kerr)

house on the 12th of September. I saw Stumpf there and saw Malter later in the day. Stumpf wanted me to go with him to see about renting a place. We first went to a place north of town at about Winery Avenue. We went to Madera and looked at another place. He said he had to go to Los Angeles the following day and I could work out there at Malter's place. He said he was going to Los Angeles to see a party about renting a place. When I went to work on the Malter place I saw Olie Olson. He was working on some copper and what they claimed they were making, a pot. He did not say anything about a still, he called it a pot. It was across the ditch bank of Malter's winery, in the field. There is a building over there. They do not call it the library. It is a different building from the library at the place. I had just a general conversation with Olson at the time. I stayed there all day. A couple of days later I saw Stumpf again at Malter's. I talked to Stumpf. Stumpf gave me some money and I came in town and bought some pet cocks and solder and some soldering irons. Stumpf told me what to get. I took these things out to the old house where Olie Olson was working. I took them in where he was working. I saw Stumpf every day. The next trip we made together was to Caruthers, to what is known as the Morton ranch. He had a talk with Morton. Later he told me that he had rented the ranch. I was out on that ranch seven days. There was a truck driver there but I could not say what his name was. He was called Shorty. I believe he drove a Chevrolet truck. During the seven days I was on this ranch at Caruthers I did carpenter work, tearing out and getting this barn cleaned out.

(Testimony of Walter G. Kerr)

Some material was brought out there by the truck driver. They said they were going to use it for a still. Stumpf told me that. I never saw Coates down there. Finally I refused to work any more. I went out to Malter's place and told him that I was through. Malter and I went over to Stumpf's house and had a conversation with Stumpf and I told him the same thing, that I was through with him. He said I had cold feet. I told him I knew I did. I told him and Malter that I did not want to be mixed up in that kind of a deal. Malter paid me twenty dollars and five dollars for my work. Stumpf called the concern a corporation. Always spoke of it as "the corporation". He said he was the head of it; that he was the big buy. I never saw any still.

#### CROSS-EXAMINATION

I never heard Coates' name mentioned by anybody. I had known Malter about three years. I had done lots of work for Malter before this out at the Malter vineyard. I never attempted to build any still for him before. I worked on the water wheel there and some work around the house. I saw the still out there on the Malter place in the syrup plant. Many times I heard Malter talk about being in the grape syrup business. I never heard Stumpf talk about being interested in or connected with the grape syrup business. It was Stumpf that told me he wanted to build a still. My business is that of carpenter. The real reason I quit was because I got cold feet. It was also because I distrusted Stumpf. I did not like him. I told him so. I told him he did not keep his work with me.

Stumpf never paid me the full amount of wages due me. I demanded it of him. He told me to go to hell.

(Testimony of G. H. Malter)

Prior to the commencement of the taking of testimony in this trial, and prior to the time when the first witness, Alexander Stumpf, was sworn and began to testify, an order was made by the court that all witnesses in the case, including the witness G. H. Malter, be excluded from the court room during the taking of testimony in the case.

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G. H. MALTER,

a witness called on behalf of the Government, after being duly sworn, testified in substance as follows:

My full name is George Hugo Malter.

MR. SAVAGE: If the court please at this time I want to bring up a matter, whether it should be brought up before the jury or not, I don't know. It is in reference to the examination of this witness. At the beginning of the trial the witnesses were all asked to be excluded. Of course, the reason for the exclusion was so that they might not know or be advised of the testimony, especially of their accomplices. I have been told definitely that this witness has been furnished with the testimony as it was transcribed from day to day. If that is a fact, I want to make inquiry of this witness and produce the proof as to that situation. Whether it should be done in the presence of the jury or not, I am calling the court's attention to it.

THE COURT: Does the Government care to be heard on this matter:

MR. McNABB: Why, we have nothing to conceal in the matter, your Honor. This witness has been furnished with part of the transcript and has been interrogated on

(Testimony of G. H. Malter)

it, of course. We interrogated him last night on the various points raised in the testimony and he may have, I think I have seen him reading the transcript out there, portions of it here in the office, and he read portions of it last night, I am sure.

MR. SAVAGE: Was that furnished to him by the Government?

MR. DAVIS: He has not been furnished with any copy in the sense of being furnished with it.

THE COURT: No, I am not aware of any rule—

MR. SAVAGE: That is exactly the thing,—

THE COURT: Go ahead with your law. You say the evidence was not furnished him by the Government?

MR. SAVAGE: Well it was the Government transcript.

MR. McNABB: It was the Government transcript.

THE COURT: I understand.

MR. McNABB: And he came in and wanted to see the transcript and we let him look at it.

MR. SAVAGE: That is the only statement we want.

MR. McNABB: And told him he could read it if he desired. It was not all furnished to him.

THE COURT: All right.

MR. SAVAGE: I think they will concede it. I do not know that the government attorneys had been parties to it. I say it was done in good faith, and I think that they believed they had the right. But we think it would be prejudicial.

THE COURT: Have you any criticism of the method pursued as to the examination of a witness by the party producing him as to the testimony given?

\* \* \* \* \*



(Testimony of Wilbert G. Whitfield)

MR. SAVAGE: Yes, I do.

THE COURT: You have an objection to it? You do not do anything like that, do you?

MR. SAVAGE: What is that?

THE COURT: Isn't that practice followed by the defense in this case?

MR. SAVAGE: Absolutely we go over the case and ask about this and that, and prepare the case, but as to furnishing him with the statement or the information—

THE COURT: It amounts to the same thing, it seems to me.

MR. SAVAGE: Here is the authority, in my judgment, it is a clear defined case of contempt of the court when he is excluded so that he cannot hear the testimony, of a witness and then he be furnished by one of the parties with that very written testimony.

THE COURT: That does not seem to be the case here. Mr. McNabb says that only excerpts were furnished.

After further discussion between court and counsel and after further argument between contending counsel, it was agreed that the witness, G. H. Malter, should be temporarily withdrawn by the Government, and that the question of the admissibility of his testimony should be further considered by the court before final decision thereon.

#### WILBERT G. WHITFIELD,

a witness on behalf of the Government, having been previously sworn, further testified, in substance, as follows:

I was sworn yesterday. The matter of the Foss Ranch still investigation—the Caruthers end of it, the whole

(Testimony of Wilbert G. Whitfield)

transaction—came to my attention from time to time on anonymous information brought in by undercover agents. It was about September, I believe the middle of September, or October, 1930. I began piecing the information together as the information came in. In the course of my investigation I came in contact with these defendants. The first man I interviewed was Kenney. I heard Kenney's testimony this afternoon. I also interviewed Mr. Olson. I also interviewed Mr. Olson in my office, in Fresno. The interview with Olson was taken down in shorthand, and was afterwards typewritten. The typewritten statement was given to me by Mr. Ohanesian, and I took it to Mr. Olson and submitted it to him. He read it, or I read it to him. He signed it, in my presence.

At this point the typewritten statement made by the defendant Olson was offered in evidence by the Government, to which offer the defendant Coates, through his counsel, objected, on the ground and for the reason that the said statement contained matter damaging and prejudicial to the defendant Coates, and on the ground that the said statement of the said Olson was made after the termination of any possible conspiracy alleged in the indictment between Olson and the other defendants, and on the ground that such statement so made after the termination of the said conspiracy by the defendant Olson was not binding upon his co-defendant or co-conspirator Coates.

THE COURT: The objection, of course, is good. That is the position of the Government, no doubt?

MR. McNABB: Yes, sir. This is offered only as to the defendant Olson.

(Testimony of Wilbert G. Whitfield)

THE COURT: Yes.

MR. McNABB: The things that are said in there that relate to other defendants, it is conceded that they are not binding upon the defendants and that the jury, of course, we are perfectly willing that the jury be instructed to disregard it as to any other defendant, but you cannot segregate it.

(The Court reads—the statement)

THE COURT: Well, apparently it is a narrative, of the events testified to by the first witness—

MR. CURRAN: Mr. Stumpf?

\* \* \* \* \*

THE COURT: Mr. Stumpf. Very well.

\* \* \* \* \*

THE COURT: It is so natural, it is so interwoven, Mr. Curran, I see no way to segregate it, and I do not think it can be done intelligently. Go ahead and have it done.

MR. CURRAN: I ask for an exception.

MR. McNABB: For the purpose of refreshing your memory—

THE COURT: Well, are you going to read it?

MR. SAVAGE: Are you going to offer that in evidence?

THE COURT: Is there any denial on the part of the defendants that this statement was made by the defendant Olson?

MR. CURRAN: No, there is no denial.

THE COURT: Then the jury should be instructed, and I will instruct you now that the rule in this case, as I

(Testimony of Wilbert G. Whitfield)

will fully instruct you later, is that after a conspiracy has ceased, then of course one party is not bound by the acts or statements of another party to the original conspiracy. It is just like an agent. A principal is bound by the act of his agent so long as the agency exists. Now, after a conspiracy ceases, or rather after the agency ceases, naturally he is not bound. Now, it is the same principle with reference to a conspiracy. During a conspiracy the acts of one conspirator in furtherance of a common design bind all of them, but after the conspiracy has ceased, then the acts, statements or words of one conspirator actually does not bind all of the conspirators and it binds only that one. If it were, in my judgment, possible to extract or to separate one from the other, one part from the other, I would think that that would be the best method to do it, but you are instructed now, gentlemen, that so far as this case is concerned, the statement or the testimony of Olson, as shown in that statement, binds Olson only and is not to be regarded by you as evidence against any of the other conspirators. Now, go ahead.

MR. SAVAGE: May I note an exception to the instruction by the Court?

THE COURT: Yes.

MR. SAVAGE: And Mr. McNabb has just now offered in evidence previous to that, and no objection could properly be made, and I now want to object to the signed statement of Mr. Olson being offered in evidence; clearly from the statement it can have nothing to do with his guilt.

THE COURT: I understand that you are asking the witness if Mr. Olson said so and so at this time?



(Testimony of Wilbert G. Whitfield)

MR. McNABB: Well, I was going to, but I thought as long as they did not question Mr. Olson did not sign it, I would offer it as a whole and read it to the jury.

THE COURT: That would be the expeditious way.

MR. SAVAGE: Well, he is offering it in evidence, and I am making that objection to it.

The objection was overruled by the court, to which ruling the defendant Coates, through his counsel, then and there duly excepted.

The statement was thereupon read in evidence by the United States Attorney, and was, in part, as follows:

“United States v. Alexander Stumpf, et al; No. 1528-C. Statement of Olie Olson, who states that his full and true name is Arthur Emil Olson. This is a statement taken from Olie Olson in the office of the United States Attorney in the presence of Bud Olson, P. Mastro, and Prohibition Agent Whitfield, and Miss E. C. Jessup, Stenographer.

“All questions in this statement were asked by Agent Whitfield, except as otherwise noted.

“Olie Olson, who states that his full and true name is Arthur Emil Olson, being first duly sworn on oath deposes and says that he makes this statement of his own free will and accord and states his willingness that same might be used by the District Attorney in the trial of the above-entitled case, and give testimony relative to such facts as are within his knowledge.”

(The statement here shows that Olson, in response to questions propounded, narrated when he first became acquainted with defendant Stumpf, his conversations with the latter about setting up a still, his receiving \$100 from Stumpf to buy materials, the connection of defendant

(Testimony of Wilbert G. Whitfield)

Brix with the enterprise, Malter's participation in the same, and so forth.)

Q. Did you see Coates at all?

(At this point the defendant Coates interposed an objection, on the ground that testimony was being received of a witness in the form of a written statement and that he, defendant Coates, was deprived of an opportunity to cross-examine the said witness. The objection was overruled by the Court, to which ruling the defendant Coates excepted.)

A. Yes, I met Coates several times out there at St. George Vineyard.

Q. When was the first time he came out there?

A. A long time after I started the still.

Q. How far had you gone in building the still when Coates first came out there?

A. I had it all completed. Mr. Stumpf and Malter gave me the design and told me what sort of still they wanted.

Q. When did Coates come out there?

A. He came out there some time after I had started building the still.

Q. Did you have a talk with him?

A. Yes, I had a little conversation with him. Coates did not know anything about this still at all. He had a proposition, he wanted to build a still, too.

Q. Did he say what kind of still?

A. A Whiskey still.

Q. What kind of still, size and what was he going to do with it?

(Testimony of Wilbert G. Whitfield)

A. He wanted to know about what it would cost and I told him, I forgot just what I told him, but I didn't see him for quite a while and he never said anything more about it. He said he wanted a still that would run out quite an amount.

Q. Did he say where he was going to put the still, or did he give an order?

A. No. He didn't know anything about the still I was putting up.

Q. When Coates first came out was Hugo Malter there with him?

A. Yes.

Q. Did Hugo say anything?

A. Malter in the presence of Coates said that Coates himself was going to put up the money for the still but Coates did not know anything about this one that I was building.

Q. You understood that you were taking your instructions from Stumpf? as to the size and the model of the still and the design?

A. Yes.

Q. Did he look at the still after you had started it to see whether you were building according to his instructions?

A. He was out there every day.

Q. After you had finished the still was he satisfied with it?

A. There were several months that nothing was done, and the first thing I knew, he had the thing carted up in the hills and in four sections.

Q. Did he ask you to go in the hills you to set it up?

(Testimony of Wilbert G. Whitfield)

A. Yes, Stumpf did. He said if I would come up and set up the still that he would pay me off in full.

Q. Was anyone with Stumpf at this time?

A. No.

Q. Did you tell him that you would go with him and set up the still?

A. I told him I did not care much about it, but he begged me to go up and said if I would complete the still he would pay me off in full.

Q. Did you go up to the ranch?

A. Yes, Stumpf took me up in a Cadillac touring car.

Q. Did you set up a still at the ranch?

A. Yes.

Q. Was Stumpf with you when you set up the still?

A. Yes.

Q. Did he tell you how he wanted it set up?

A. Yes.

Q. Did you set it up the way he wanted it set up?

A. Yes.

Q. Who was present at the ranch at the time you set up the still and who assisted you?

A. Kenney, Proctor and Stumpf and we all worked together setting up the still.

Q. Were you there when they started the still in operation?

A. Yes, I was there when they started, but it was not exactly completed. It didn't work right. There was a burner under the still and it worked all right but the condenser was too big.

Q. Did Stumpf say that the condenser was too big?

A. No, I told him it was too big.



(Testimony of Wilbert G. Whitfield)

Q. What do you mean when you said that the still did not work right, how did it act?

A. It did not continue, the condenser was too big, it cooled off too much.

Q. Was there any explosion?

A. Not while I was there.

Q. What did Stumpf do about it?

A. I don't know, he brought me down there and let the boys take me back but I never seen him since.

Q. Did Stumpf tear down the still for the purpose of making changes?

A. No, sir.

Q. Do you know a man by the name of Walter Kerr?

A. Yes, sir. I just met him last summer.

Q. Was he present at any time at Malter's while you were building the still?

A. Yes.

Q. Did you have a conversation with him, and state what it was.

A. Yes, but I could not state what the conversation was but he assisted me in building the still.

Q. Did he know for whom this still was being built?

A. I don't know whether he knew or not.

Q. Did you ever see Walter Kerr and Stumpf conversing together about the still?

A. No.

Q. What part of the still did he assist you in building?

A. The base.

Q. Did Walter Kerr go up to the ranch with you?

A. No.

(Testimony of Wilbert G. Whitfield)

Q. Do you know whether or not Walter Kerr received any money for wages for building this still?

A. No.

Q. Did Walter Kerr state how much he was to receive?

A. He said nothing to me about it or for whom he was working, but I think he was hired by Malter.

Q. Who brought you down from the ranch after you finished working on the still?

A. Alexander Stumpf and Kenney.

Q. Did he pay you the money he owed you for working on the still?

A. No.

Q. Did he ever promise to pay you the money?

A. Yes.

Q. What was the amount that he agreed to pay you?

A. \$10 a day.

Q. What amount did you figure it to be?

A. I figured that at his price it would be \$1200, the time I put in.

Q. Has he since offered or made any effort to pay you the money?

A. No.

Q. Do you know whether or not the copper which you purchased for the still was paid for?

A. Yes, I paid for it out of the \$100 that was given me.

Q. Did you see Ted Brix up at the still while you were working on it?

A. No.

Q. Did you see Coates?

(Testimony of Wilbert G. Whitfield)

A. No.

Q. Did Stumpf at any time you were working for him tell you that he was the whole works?

A. No.

Q. Have you seen Stumpf at any time since leaving the ranch?

A. Three times—I saw him twice at the St. George and once at his house. The first time I saw him I asked him for some money. I met him again out there at the St. George. He said, ‘all right, I am going to the bank now and will meet you at the bank at 1 o’clock’ and I waited from 1 o’clock until 8 o’clock and then went back to the St. George again and then he come around Monday morning and said his mother-in-law was sick and said he would give me money today and I was there at the bank at 12 o’clock when he told me to come and I waited and it was 1 o’clock and he never showed up. And another time I went out to his house. I rode on my bicycle out there and he said he did not have any money, that Hugo had it all tied up in the bank, and I have not gotten any money yet.

Q. Was that the last time you saw him?

A. Yes, the third and last time I saw him.

Q. Did Stumpf at any time tell you where he was getting the money from to build this still or who was paying him the money?

A. No, he never.

Q. Did you see Zone Kirkorian at any time out at the still?”

MR. LINDSAY: If your Honor please, I am not going to object at this time, but I do not waive my rights

(Testimony of Wilbert G. Whitfield)

to object to future or other statements that may be offered.

THE COURT: Overruled. This will take the same course as the other. Overruled.

MR. LINDSAY: I make no objection at this time.

MR. McNABB: (Reading)

"Q. Did you see Zone Kirkorian at any time out at the still?

A. I don't know Kirkorian.

Q. Did you see D. Arkalian at any time out at the still?

A. I did not know Arkalian but I saw him out here in the hall the other day.

Q. Was James Proctor and Eugene Kenney out at the still all of the time that you were working on the still at Auberry?

A. Yes.

Q. Have you had any conversation with any of these defendants charged in this conspiracy lately?

A. None but with Hugo Malter."

Signed "A. E. Olson."

The defendant Coates, through his counsel, thereupon, by motion, applied to the court for an order striking from the evidence all parts of the statement made by Olson referring to defendant Coates, on the ground that such portions of the statement are and were irrelevant, incompetent and immaterial, not binding upon the defendant Coates, made after the termination of any conspiracy which might have existed between Coates and others of the defendants, and on the ground that he, the said defendant Coates, had been deprived of an opportunity to



(Testimony of Wilbert G. Whitfield)

cross-examine the said Olson as to such statements made by him.

The motion so made by said defendant Coates was thereupon taken under advisement by the Court.

(Testimony of Mr. Whitfield, witness for the Government continued.)

I observe Government Exhibits 1, 2 and 3 over on the other side of the court room. I first saw the column and the condenser in a brush pile on the Malter Ranch. The condenser is the shorter of the two cylinders, and the column is the longer of the two cylinders. The longer of the two cylinders is marked Government's Exhibit No. 1. That is what I call the column. The shorter of the cylinders is Government's Exhibit 2. That is what is called a condenser. Government's Exhibit No. 3 is the square box or base under it.

I first saw these exhibits, as stated, in a brush pile on the Malter Ranch, on or about April 22d, after Hugo Malter had 'phoned me. I seized two 4000 gallon vats and eight 50 gallon vats and a pump and a small boiler at the Foss Ranch. It was in a barn. I first made the discovery on April 5, 1931. It is a fact that Hugo Malter pointed out to me the place where I discovered these articles.

The witness thereupon narrated an interview between the defendant Brix and certain Government agents, and particularly an agent named Dibble.

Q. By MR. McNABB: Did not Mr. Brix offer to plead guilty?

Whereupon the defendant Coates, through his counsel, objected to the question, upon the ground that it was irrelevant, incompetent and immaterial, not binding upon

(Testimony of G. H. Malter)

the defendant Coates, not made in the presence of Coates, and made after any conspiracy had fully terminated.

THE COURT: This is something happening after the indictment, of course, and after the conspiracy had terminated, and is therefore only admissible against the one making the statement. That is the rule. The jury no doubt understands that because I stated it very plainly yesterday.

The objection was by the Court overruled, whereupon the defendant Coates, through his counsel, then and there duly excepted.

A. Mr. Brix did not offer to plead guilty himself, but he stated about this airplane deal and about the syrup. Mr. Fenston said that he was willing to enter a plea of guilty to any misdemeanors on the charge, but he did not like to see the boy do a jail sentence for a conspiracy.

At that time defendant Brix was questioned for over two hours by Mr. Dibble in my presence. He answered all questions freely and voluntarily. He offered to plead guilty to any misdemeanor charges.

#### G. H. MALTER,

recalled as a witness on behalf of the Government, having been previously duly sworn, testified in substance as follows:

Here the court announced its ruling on the question of the admissibility of the testimony of the Government witness G. H. Malter.

The Court said:

"With reference to the testimony of Mr. Malter, I was convinced at the beginning that that is a matter that is

(Testimony of G. H. Malter)

within the discretion of the Court. \* \* \* It is not the fact that he disobeys the order of the court, that is not a reason for excluding his testimony.

“And in this case the whole surroundings of it, and the facts appear not to call for any exclusion. As I stated yesterday, it is the duty of counsel to know what his witness is going to testify to before he goes on the stand. And the witness in this case, it seems conceded on all sides, is free from fear of prosecution, having testified before the Grand Jury. That is my understanding.

“So I think the testimony must be admitted.”

THE COURT: Yes, sir, Mr. Curran.

MR. CURRAN: That we be permitted to show at this time through the testimony of the witness Malter, exactly what the circumstances were surrounding his reading of these transcripts, so that you will pass upon the matter of the discretion when you come to it, Your Honor will be better able to exercise that discretion, if your Honor has all the facts before him.

THE COURT: The discretion is exercised already.

MR. CURRAN: May we add for the purpose of the record.

THE COURT: You may do that by cross-examination. It will be an idle act if you are going to do that with a view to change the ruling of the Court, Mr. Curran.

MR. CURRAN: For the purpose of the record.

THE COURT: I am basing this on the proposition that the United States Attorney has acquainted the witness with different facts in the case as to the testimony of witnesses for the purpose of checking up on the wit-

(Testimony of G. H. Malter)

ness' testimony as shown in a general transcript of the evidence.

MR. McNABB: What?

THE COURT: That is, you have given the witness the general transcript of the evidence?

MR. McNABB: No, your Honor.

MR. CURRAN: Yes, sir.

MR. McNABB: He has been shown—

THE COURT: Excerpts?

MR. McNABB: Yes. This transcript has never been in shape so you could show it to anybody. It was gotten out in piece-meal.

THE COURT: That was my understanding.

MR. McNABB: What happened to it the other night, the night before last, we asked the witness to come down to the hotel as we wanted to talk to him. Now, your Honor will understand that Mr. Davis and I knew nothing about this case when it came up here. It was developed by Mr. Ohannesian. We knew none of the witnesses, never had seen any on either side. So we asked, after hearing the testimony in part, we asked him to come down to the Hotel, and we left him in the room, I wasn't in the room, Mr. Davis had him, but we went to dinner, and we left the witness in the room there, while we went to dinner. There was a portion of one day's record of the trial in that room. And then, when we came back, he was reading it. I don't know how much of it he read, but he couldn't have read it all through in that time, I don't think. Then, we put him on the grill to ask him questions. Of course, we asked him with reference to matters that were in the testimony that we had before.



(Testimony of G. H. Malter)

And we didn't have the first day there, and I don't know whether that was the second day,—will you explain to the Court, Mr. Davis, just what happened?

MR. DAVIS: If the Court please, I don't remember what day that was, but I think it was—

MR. McNABB: The second day.

MR. DAVIS: Two or three days ago. And at that time there was, I think, just a fragment of part of the record consisting of a very small part of the entire record. And when we returned, as Mr. McNabb said, if I recollect correctly, Mr. Malter was either reading that or had it in his hand at the time, and immediately after that we started to inquire of him as to what he knew about the case.

I will say this, that never at any time has Mr. Malter had either in his possession, nor have I had in my possession the entire transcript of any one witness in this case; and he has never seen the entire transcript of any one witness in this case so far as I know.

THE COURT: I understand that was the general scope of the investigation. Proceed.

Whereupon the defendant Coates, through his counsel, then and there duly excepted to the ruling of the court.

Thereupon the defendant Coates, through his counsel, by motion, asked permission of the Court to examine the witness Malter as to the true facts. The motion was by the court denied, to which the defendant Coates, through his counsel, then and there duly excepted.

I live five miles east of town, and I have lived there all my life. I believe I am acquainted with all the defendants in this case. I have known Stumpf about a year, Kenney

(Testimony of G. H. Malter)

about six months, Olie Olson about a year, Cap Olson a couple of years, Arkalian about four or five months. I never met Kirkorian. I have known Brix about a year and a half, I guess, perhaps two years. I knew Brix in a social way prior to this transaction.

Brix called me up and told me to come down to his office. I went down there and met Stumpf. He introduced me to Stumpf. No one else was present. We had a conversation. It was some time early in August, about 10 o'clock in the morning. Stumpf led the conversation off. He told about the various experiences he had—successful and unsuccessful experiences in the bootlegging racket. Then there was some conversation of syrup, as to the practicability of using syrup as a distilling material—stuff out of which alcohol could be made—as a substitute for sugar. Something was said about whether syrup would be as well in making alcohol as sugar, and comparison of prices, comparison of the taste after it was finished, and so on.

That is about all. I don't remember any special thing Brix said. Brix asked a question or two along the line of the grape concentrate and syrup and sugar, and so on. I don't remember anything else that was said at this time. Nothing definite was arrived at.

The next meeting was when Brix brought a Mr. Denning out to my house one evening. Denning is a friend of Brix from Sacramento. Denning followed Brix in his car. The only conversation was on the practicability of selling port wine and brandy, brought up by Mr. Denning. They asked me if I had any brandy or port wine on hand. I believe Denning said he had a pretty good

(Testimony of G. H. Malter)

sale for port wine. Brix asked if I had any on hand. I told him no, outside of for my own personal use. That was about the entire conversation.

A few days later Brix called me up. I went down to his office. I met Denning and Stumpf and Brix. Stumpf said they had two stills running, and he was intending to start another one. Denning told about some activity of his along the same line. I don't remember Brix taking any part in the conversation at that particular time.

Q. Well, go ahead and tell all the conversation. You know what happened. Tell the Court and Jury what happened.

MR. SAVAGE: I object to those remarks of counsel's. I ask that it be stricken from the record.

The court denied the motion and overruled the objection, and defendant Coates then and there, through his counsel, duly excepted to the ruling.

Well, if I remember, we left Brix's office and went to Brix's house. Stumpf said something about starting his third still. He said the output of these other two stills that he was running was completely taken up, and this third he was intending to start, he was trying to find a distributor for. The conversation drifted around where Brix and I were to supply the wherewithal to get the still going and Denning was to take a one-fourth interest in the still for distribution of the stuff. Stumpf was to be manager and was to supply a truck to deliver the liquor, or something to that effect. At that meeting nothing was said about putting up money or financing the proposition.

(Testimony of G. H. Malter)

That was at another meeting between Brix, Stumpf and myself, after Denning left. That meeting lasted all day, but the whole thing was given up to a business meeting. We had a meeting and then just talked about other things. In the business meeting it was talked that Denning was to distribute this new supply of alcohol, and that a week or ten days would probably elapse before he would have it ready or coming. Brix and I and Stumpf were to get together and fix that, settle that right up, right after Denning left. A day or two later Brix and I went out to Cap Olson's on Winery Avenue, about eight miles or so from my place. His initials are A. J. Olson. It is not Olie Olson, but his brother.

I introduced Cap to Brix. There were a lot of apricots that Olson had in sweat-boxes, and the suggestion was made as to what good apricot brandy they would make. The rest of the conversation was more or less general. Brix said something about a man who could make a still, and Cap Olson said something about his brother. That is Olie Olson. After we got through there we went back to town.

The next time we met was when Brix called me up and wanted me to come in to his house. He had a couple of men there who were also after the job of distribution. Stumpf was there. I don't know whether they were his friends or Stumpf's, but they were there. At that time we had no definite conversation in connection with this enterprise. Nothing was said except that they were to meet us later. I never saw these other men again.

Stumpf and Brix and myself had another meeting. All these meetings were in August. At this meeting Cap



(Testimony of G. H. Malter)

Olson was present. It was agreed that Stumpf and I were to go out to Cap Olson's. We went out to Cap Olson's, and Cap said that he would get hold of his brother to make the still, and an appointment was set for the next day or two for his brother to come over to my house and meet there at 2 o'clock. We told Brix about the meeting, and we were all supposed to be there at 2. I was there and Stumpf arrived at 2. So did Olson. Stumpf asked Olson a lot of question on what he knew about making a still. I mean Olie Olson. Brix arrived and said that he had somebody else in the car, and said he had to go to Sanger, or some place or other, and he could not stay, but to come in, and put in \$500. That was paid to me. Brix came in the house and only walked a few feet in. Stumpf and Olson stayed in the other room, so he gave me the \$500, and then Stumpf came out, and there was something to the effect that Olson had a flat tire, and Brix said he would send Olson out a tire. Then Brix left. And Stumpf and I went back to the other room with Olson. The tire arrived. It was put on Olie Olson's car. Stumpf, Olson and I sat and talked for a few minutes, and it was agreed that Olson should have \$100, so I gave Olson \$100 out of the \$500 that Brix had handed me, and gave Stumpf the other \$400. That is all that happened at that time. I don't believe I was ever out there with Brix.

The next time I saw Olie Olson, he had a lot of copper and a few tools. I gave him an old building to put them in. He put them in the building and left again. I saw him again after that, at my place. As to where the

(Testimony of G. H. Malter)

material should be used, Stumpf said he had several places in view he could get to put the outfit up on.

About this time Olie Olson began to manufacture an alcohol still. He was there during the process. He got various pieces together. Stumpf came out every three or four days and looked at it. Brix came out during that time. I saw him at the still or at the place where the still was being made. Stumpf, Brix, Olson and myself were there. They looked at it. Stumpf said Olson was not making it long enough and Brix said the soldering was terrible. Brix showed Olson how to do the soldering. He soldered a piece himself. I think Brix brought some solder out there.

After a while the stuff was moved over to Cap Olson's place. Later Stumpf said Cap Olson had changed his mind. Stumpf had given Olson \$100 but Olson paid it back. The tanks were moved over to Olson's barn where they remained for a few days. Then they were hauled to Cain's place about ten miles distant, where they remained possibly a month. Then they were taken over to another place that Stumpf had on the West Side. This was the Caruthers place. Then they were moved back to Cain's.

After this Denning returned to get the alcohol. Stumpf said it would be impossible to deliver it until later. There was a lot of quibbling on the price. Denning was trying to get the price reduced. Brix was saying that the outfit was expensive and that the price ought to be higher than what Denning suggested.

(Testimony of G. H. Malter)

I did not put up any money. I was supposed to put up some syrup when they got the tank set and ready to put the syrup in. The Caruthers ranch is located about ten miles west of town. I went out there with Stumpf and Coates. That was in October. When Stumpf got the Caruthers place he wanted two laboring men. I recommended Kerr. Coates recommended Andreas who had a truck and was to do the hauling. He was working for Coates at that time. Stumpf and Coates and myself went down near the Caruthers place at one time. We rode by the place a couple of times. That was sometime in October. We drove by the place and went in the place once. First we drove by and later we went in. I think Jess Coates and myself were together when we went in. We saw some tanks and equipment and some men working. They were Kerr and Cannon. They were setting up tanks and cleaning the barn out. Stumpf at that time said he had paid \$375 as rent for the ranch.

I have seen this, Government Exhibit No. 5, before. I saw it at my house sometime in October. Coates, Stumpf and myself were present at the time. Coates wrote down some of the items of the expenses that had been put out. Stumpf gave him the items.

Q. Has that card been under your control at any time since that, since he wrote on the card that you are speaking of? Have you had it under your control or in your possession at any time?

A. Yes.

It was left on the table and I accidentally picked it up in a corner some four or five months later. That is the card that Coates was writing on at the time.

(Testimony of G. H. Malter)

Here the yellow card, Government Exhibit No. 5, was offered in evidence by the Government. To this offer, the defendant Coates, through his counsel, objected on the ground that it was irrelevant, incompetent and immaterial, and that no proper foundation had been laid for its introduction, and that it had not been properly identified. The objection was by the court overruled and the defendant Coates then and there excepted to the ruling of the court.

The card, with the memoranda thereon, was thereupon read to the jury. It consisted of various alleged items of expenditure for labor and materials, etc.

I know about the time Stumpf went to San Diego. It was the first part of October. I talked with Stumpf or Coates in connection with the San Diego trip. I believe it was in Coates' automobile. The automobile was on the road some place around town here. Stumpf said he had a ranch out here that would make a good location for a still. Out near Clovis, so he had Coates drive us out there to look at the ranch. We looked the ranch over and came back to town. Stumpf said the owner of the ranch lived in San Diego and it would be necessary to go down to San Diego. I guess he went down for he said he did.

A lot of material was taken down to the Caruthers ranch and remained there three weeks or a month. Then it was taken back to the Cain place, partly back to the Cain place, and partly to my place. Things weren't going well between Stumpf and the laborers. IT seemed they put up a tank and then the Power Company men came to fix up the wire. They had to take the tanks down so that the Power Company men wouldn't see them.



(Testimony of G. H. Malter)

At this point the defendant Coates asked for an order striking out the latter part of the testimony on the ground that it expressed the conclusion of the witness.

THE COURT: Is this the result of a conversation, what was told you?

A. Yes, sir.

Q. By whom?

A. By Stumpf.

THE COURT: Alright. Overruled.

The court denied the motion to which ruling the defendant Coates, through his counsel, duly excepted.

Coates told me that Andreas had reported to him that one of the power company men or somebody looked into or saw the tank down there and saw this work going on beside the barn and "then Coates and I decided that it would be a better idea to get out of the place, it might be dangerous."

We went over and told Andreas to move the stuff out. We arrived at Andreas' house and Coates went up and told him what we wanted.

Then we moved all the stuff away from the Caruthers ranch, taking part of it back to Cain's place and the rest of it to my place.

The equipment, etc., was next taken to the El Senora place. Stumpf said he had rented it. He said he had paid \$300 rent for it to some lady with whom he had a quarrel.

From the El Senora place, the equipment, etc., was taken to the Foss ranch. I am acquainted with Mr. Foss now but I did not know him at the time. All I know about renting the Foss ranch is what Stumpf said. He told me about it. He said he had a very good ranch up in the

(Testimony of G. H. Malter)

mountains and he felt it was the proper place to move to. He said the cost was \$750 but that he had Jewed the man down to \$500. The material, equipment, etc. were moved up to the Foss ranch some time in December. I did not help move it. I gave it to Stumpf. He was the only man I gave part of the still to. I have seen these, Government Exhibits Nos. 1, 2 and 3, before. That looks like the still that was moved to the Foss ranch. Stumpf told me that there had been produced in that still at the Foss ranch about a gallon of alcohol. He brought a sample of it down to Fresno. He gave me a taste of some liquor. I don't know anything except that Stumpf told me. Stumpf, Coates and myself were present. Stumpf said that this was some alcohol. This was in January. Coates and I tasted it and it was pretty strong. Coates seemed to like it.

Whereupon the defendant Coates asked that the last sentence of the statement be stricken out on the ground that it was not responsive and that it called for the opinion and conclusion of the witness. The motion was denied. The defendant Coates thereupon, through his counsel, duly excepted to the ruling of the court.

Coates took two or three drinks of this.

Q. What did he say at the time that he took these drinks?

A. He thought that it was pretty good. I mean, he said it was pretty good.

Q. Anything else? Anything said in reference to getting any of it, any more of it?

To which question the defendant Coates, through his counsel, then and there objected, on the ground that the

(Testimony of G. H. Malter)

question was leading. The objection was by the Court overruled to which ruling the defendant Coates then and there excepted.

A. He wanted Stumpf to get some, to have drinking liquor. He suggested that Stumpf get five gallons. He said, "Well, can't you get five gallons of this?"

There are some expenses incurred that are not included in that card according to what Stumpf told me. I think Stumpf bought one hundred turkeys which cost a hundred or a hundred and a quarter or something like that.

Whereupon defendant Coates through his counsel asked that the testimony regarding the purchase of turkeys be stricken from the records as irrelevant, incompetent and not material. The motion was denied by the Court. Whereupon defendant Coates duly excepted to the ruling.

He bought one hundred turkeys from Kerr. I know that of my own knowledge.

At a conference between Brix, myself and Stumpf, it was agreed that Stumpf should get \$10 a day. That was at Brix's service station sometime in August 1930. There was also a steam boiler not included in that card.

I have been engaged in the grape syrup business. These tanks were all bought down here at the Celo Winery. None were furnished by me. Eight tanks were bought, all at the Celo Winery. The tanks were taken to Cain's place and stayed there several weeks. The tanks were all knocked down. I believe Kerr and Andreas and Cannon set up some down at Caruthers. First they were taken to Olson's, then to Cain's. Then back to Cain's, then down to Caruthers. Then they were taken back to Cain's.

(Testimony of G. H. Malter)

### CROSS-EXAMINATION

At this point Mr. Curran cross-examined Mr. Malter relative to the extent of his reading of the transcript of the testimony of witness Stumpf. Mr. Malter testified in substance that he read excerpts out of several volumes but no complete volume; that Mr. Davis directed his attention to one or two excerpts; that he possibly read 30 or 40 pages, but he did not think it was quite that many.

It is not necessary to get permits in order to engage in the business of manufacturing grape concentrates. I never knew Congressman Barbour. No one ever told me that Barbour had obtained a permit for me to operate or run a grape concentrate plant. I never employed Barbour in any capacity. These burners concerning which I have testified were never taken to Caruthers.

The grape concentrate deal was mentioned by Coates to me. The only time that I remember that the grape concentrate deal was being mentioned was when Mr. Coates used it as an alibi once to get away from home.

The defendant Coates thereupon asked that the last statement of the witness be stricken from the record as the opinion and conclusion of the witness. The Court denied the request. Whereupon the defendant Coates duly excepted to the ruling of the Court.

Coates and I were at his house and Coates said, "We have to go out and inventory some tanks with some syrup in them." Coates and myself and Mrs. Coates were present and it was at Coates' house.

I am in the grape concentrate business now. The last several years I have been experimenting with grape or juice concentrate. When I got interested in this enter-



(Testimony of G. H. Malter)

prise with Ted Brix and Stumpf, I was interested in grape concentrates. I had some on hand a couple of years old. I was in that business before going into this deal with Ted Brix. My idea was to sell the grape concentrate that I had on hand to men who were in illegal, illicit business, and if they wanted to use it to make alcohol, it was all right with me. The man Denning questioned me about the amount of port wine, or other wines, I had on hand. He indicated an intention to purchase a considerable quantity from me.

I know a man named Ed Nichols of the Central California Detective Agency. I did not on the 26th day of September, 1931, at my place in this county, state to Nichols that I had been introduced to Stumpf at Ted Brix's office, and at the time Brix told me Stumpf had a very good deal in wine and he believed that Stumpf would be able to handle all the syrup, grape concentrates of mine. At that time and place, however, I did tell Mr. Nichols that there was no definite agreement made or anything whatsoever. I did not tell Nichols at the same place that. All I told the United States authorities was that when I met Stumpf and Brix, all the conversation was about grape concentrates.

I think I had a conversation with Nichols about the 1st of October of this year, just a few days ago. I didn't tell Nichols in substance and in fact that Ted Brix entered into this transaction with Alexander Stumpf thinking that it was to be a legitimate deal the same as I had entered into with Stumpf. I didn't tell Nichols on October 5th, 1931, at any place that the deal started out as a legitimate juice deal and when it became a still racket, Brix and my-

(Testimony of G. H. Malter)

self quit. That is what Nichols wanted me to say but that is not what I said. I said nothing like that whatsoever. At the first conversation, Stumpf did all the talking. Brix didn't get much chance to say anything. Stumpf was boasting about what a big operator he was. The next meeting was when Denning was present. I was in the grape concentrate business in August, September, October and November of 1930.

In this enterprise I didn't put up any money. I was to put up some syrup. That was my contribution. Stumpf's contribution to the enterprise was his great executive ability, or something, or technical knowledge. My contribution to the enterprise was syrup. Ted Brix's contribution to the enterprise was money. When Brix got out of the picture and Coates came into it, Stumpf's contribution was to be executive ability and brains. My contribution was to be money and Coates' contribution was to be money. When I said Saturday that I was supposed to put up syrup, it was in reference to Brix. In all, I put up \$1800. I didn't put up a cent of that while Brix was in the picture. When I talk of money put in by me I do not mean money contributed. Where I say I contributed \$1800, I mean that I put up \$1800 in cash into the hands of Stumpf. I actually gave him \$1800 in cash. The only expenditures I made Stumpf gave me the money to pay. I got receipts from Stumpf for money expended. Stumpf hijacked or stole the still from the Foss ranch. I know that he did.

When I paid moneys amounting to \$1800 to Stumpf, I knew he was a convict. I knew he was a bootlegger. I

(Testimony of G. H. Malter)

knew that Stumpf had lied to me. I knew that before I gave him this money.

When the still was taken from the Foss ranch by Stumpf it was placed in some bushes but not on my property. I took Mr. Whitfield, the prohibition agent, to the place where they were hidden. I knew where they were hidden. The man who put them there told me they were there. His name is Cannon. He worked on my ranch. I said Stumpf was instrumental in having the still hijacked from the Foss ranch. The still was put in the bushes on my place and Mr. Whitfield picked it up half an hour after it was put there. It was arranged that Mr. Whitfield should pick it up there before it was put there. I made the arrangements with Mr. Whitfield.

I have known the defendant Coates for many years. Our relations were always purely social. I had no business with him until the transactions concerning which I have testified. In the arrangements in the beginning with Brix, Stumpf, myself and Denning, Coates was not in on that; had nothing to do with it. Coates had nothing to do with the arrangements until after Brix had gotten out. I don't know that Stumpf testified that Coates never at any time knew that Brix had been in the deal. I didn't read that part of his testimony. I remember talking to you Mr. Savage in your office along about the 10th of February about this situation.

Q. Do you remember at that time telling me that you had him where he could not say a word because you had it in Coates' own handwriting where it showed what it cost to make alcohol and that he was engaged in the still

(Testimony of G. H. Malter)

business and that you had that memorandum and you were going to keep it?

The question was objected to as irrelevant, immaterial, incompetent and not proper cross-examination.

There is nothing conflicting. It cannot be used for impeachment.

THE COURT: Well, it seems to be an immaterial matter.

MR. SAVAGE: Well, this is preliminary, of course. I want to know if there is any other memorandum in existence than this.

THE COURT: Well, that is a question it is not necessary to answer. Sustained.

MR. SAVAGE: Note an exception please.

I had a conversation at one time with Coates and the witness Morin at the Fresno Hotel. Coates had a room there and I was living there too at that time. Mr. Morin came in to see Coates. I don't know whether I arrived there just before Morin or just afterwards, but there was no conversation of any serious character that could have been carried on. I left and came back later.

Q. Now tell, relate what took place after you came back, what you saw and what happened?

The question was objected to by the defendant Coates on the ground that the same was irrelevant, incompetent and immaterial, which objection the Court overruled and to which ruling the defendant Coates duly excepted.

A. They were never capable of conversation. They were intoxicated.

Whereupon the defendant Coates, through his counsel, asked that the answer of the witness be stricken out, and



(Testimony of Howard N. Foss)

the motion was denied and the said defendant Coates again duly excepted to the ruling of the Court.

When I came back, they were both lying on the bed.

### HOWARD N. FOSS,

a witness called on behalf of the Government, being first duly sworn, testified in substance as follows:

My name is Howard N. Foss. I have been in the real estate and building business and was in such business in the fall of 1930. I had a transaction with Mr. Stumpf with reference to selling him a piece of property up here near Auberry. I sold him 480 acres, 360 acres in one parcel, and 120 acres in the second parcel. The paper which you show me is a duplicate of the original agreement of sale. The signature on it is mine. It contains the terms of the agreement as to the purchase of the place. There has been no change. The ranch is about 25 miles from the vineyard country around Fresno. It is up in the mountains. There was nobody with Stumpf when we made this deal. He was introduced to me by a man named J. D. Bell.

### CROSS-EXAMINATION

I have lived in Fresno 26 years and have been engaged in the real estate business. I know the people of Fresno quite thoroughly. When Stumpf bought the ranch he told me he was going to use it to establish a dude ranch. Stumpf told me he had a backer, a financial backer, abundantly able and willing to go ahead with the business of establishing a dude ranch. He told me this fellow was Malter. I had known Malter as a child but had not seen him for 10 or 15 years. After this whole thing had

(Testimony of E. A. Nichols)

transpired, I met Malter there. He was summoned here the same as I was before the Grand Jury. The first time I met him was in connection with this transaction. I never saw Coates up in the hills on the Foss ranch. I met Coates for the first time yesterday. I never heard Coates' name mentioned in connection with this deal. Other than Mr. Malter, nobody was mentioned.

After all the foregoing witnesses had testified on behalf of the Government, the Government announced that it rested.

E. A. NICHOLS,

a witness called on behalf of the defendants, having been first duly sworn, testified in substance as follows:

My full name is E. A. Nichols. I am the owner of the Central California Detective Bureau in this city. I know the witness Hugo Malter. I saw him on or about the 26th day of September of this year out at his ranch.

Q. And I will ask you if at that time he told you that Ted Brix introduced him to Stumpf and at that time Ted Brix said, "Alex Stumpf here has a very good deal in mind and with some assistance he, Alex Stumpf, believes that he will be able to handle all of the grape syrup concentrates of yours?" Did Mr. Malter say that such a conversation took place?

To which question the Government objected on the ground that no proper foundation had been laid.

Q. By MR. CURRAN: Did Mr. Malter say that such a conversation took place?

MR. McNABB: Just a moment.

A. Yes, sir.

(Testimony of E. A. Nichols)

MR. McNABB: Just a moment. We object to that as not being proper rebuttal. In the first place that is, I think, almost identical with the testimony of the witness on direct examination. He talked about the grape syrup being made into alcohol.

THE COURT: It is identical with the testimony of the witness Malter.

MR. McNABB: Yes.

THE COURT: On direct examination.

MR. McNABB: On direct examination it was to that effect, anyway, that he had grape concentrates and they discussed the matter of making it into alcohol.

THE COURT: Yes, that is correct. That is according to my notes. They talked about concentrates.

MR. CURRAN: Your Honor, on cross-examination I asked that very question of Mr. Malter and his answer here in the record, page 255 is 'no'.

THE COURT: Well, sustain the objection.

MR. SAVAGE: Note an objection on behalf of Mr. Coates.

The witness Malter told me that he had told the United States authorities that when he met Stumpf and Brix on the first occasion all the conversation was about concentrates. I saw Malter about the first of October at his ranch. I was in the employ of the defendant in this case at that time. I went out to question the witness Malter and I did question him. I didn't do any work for Malter until February of this year. I worked for both but not at the same time. The first time I was in the employ of Frank Curran, the attorney for the defense. Malter told

(Testimony of W. D. Coates, Jr.)

me that the deal started out as legitimate juice deal and it became a still racket and that he had Brix quit.

### CROSS-EXAMINATION

I was employed by Mr. Curran about September 23rd or 24th, 1931. I was employed by Malter about the 14th or 15th of February of this year. I may have worked a week or ten days for Curran. It was an endeavor to be blackmailed by a certain party. Mr. Curran said he had just entered into the case. He asked me to interview as many of the parties as possible to get the facts of the case. This was one of the interviews I had at the time. I have been employed just the two times I mentioned. I went out to the Foss ranch to examine the still but the still had been moved before I knew anything about it. I went out with Mr. Foss.

I remember, Mr. Savage, of going to your office while I was employed by Mr. Malter. That was prior to any indictment. I do not remember telling you that some of the boys at the Foss ranch had not received their wages and unless they were paid their wages they would turn State's evidence. I don't recall telling you that the best thing Coates could do was to pay \$600. It might have been mentioned about getting the money but no such conversation as you mentioned was said.

W. D. COATES, Jr.,

a witness called on behalf of the defendant Coates, after being first duly sworn, testified in

My full name is W. D. Coates, Jr. I live at 3901 Huntington Boulevard in Fresno and have lived there off and on for forty-two years. I know Hugo Malter. I remem-



(Testimony of W. D. Coates, Jr.)

ber an occasion of his visit to my house in October for dinner. It was the 26th of October. I had a conversation with Malter during the evening. I have known him ever since he was a child. After dinner my son Lloyd Coates had gone upstairs to the bath room or somewhere for some purpose. I had gone in the living room and Malter followed me in. I asked him some very pertinent questions in reference to the grape concentrate business. I asked Malter what he was doing and what Lloyd and he were doing together in the grape concentrate business. I asked him the question because he had been in my house several times and had never mentioned the subject at all. Lloyd had talked about it from time to time, about it to his mother and myself and I was extremely interested. I asked him what he was doing, what they were doing in the concentrate business, and was everything that they were doing done legally, and he absolutely assured me that it was to the extent that he told me that he had, through the hard efforts of Henry Barbour, Congressman, acquired the proper legal permits to make grape concentrates. I said, "Well, is it perfectly all right if you make grape concentrate, and what do you do with them afterwards?" He said, "It is just the same as a man who ships a carload of wine grapes from here, it is none of his affairs what is done with it after they reach their destination. As long as I am legally making these grape concentrates I am not interested in what becomes of it." That was all the conversation. I have talked with the attorneys, the Government representatives, with Mr. Whitfield, about this case in Mr. McNabb's office. We had gone up there, Mrs. Coates and I had gone up there to talk with

(Testimony of Edna Pearl Coates)

Mr. McNabb in a general way on the subject of the case. As we were about to leave the office I was nearest the door, Mr. Whitfield was nearest there and adjacent to me was Mr. Davis.

At this point the Government objected to any further testimony on the part of the witness on the ground that no foundation had been laid.

MR. SAVAGE: The purpose is to show that Mr. Whitfield told Mr. Coates that he believed that Mr. Coates started in a grape concentrate syrup deal in the beginning.

THE COURT: Is that to be controlling in this case, do you think?

MR. SAVAGE: It throws a lot of light on Mr. Whitfield's testimony.

THE COURT: Mr. Coates' complicity, his connection with this matter, whether guilty or innocent, should be judged by the evidence, certainly not by Mr. Whitfield's opinion. Objection sustained.

MR. SAVAGE: Note an exception.

#### EDNA PEARL COATES,

a witness called on behalf of the defendant Coates, after being duly sworn, testified in substance as follows:

My full name is Edna Pearl Coates. I am the mother of Lloyd Coates. I heard Malter testify in court that he used an alibi to me, used grape concentrates so as to put me off my guard. I never had a conversation with Malter in which grape concentrate was ever mentioned. I have never talked to Malter about grape concentrate. I have never talked to Malter about this conspiracy.

(Testimony of N. Lindsay South)

### CROSS-EXAMINATION

I heard the testimony about the night Malter took dinner there. I don't believe my son mentioned concentrates or going with Malter that night at all. My son had told me very freely about concentrates before. He had told us, his father and me. We talked very freely. Malter didn't mention it at all. My son didn't keep telling me all the time that he was in the grape concentrate business, he told me and he told his father that he had gone into the grape concentrate of grape syrup in which he thought that they were one and the same. That he had gone into that business. Nothing further was said for a little while. One time I asked him what he had done. He said, "I don't think anything has been done so far." When he told us both of us tried to persuade him not to enter the business for the reason that he knew nothing of it. It was foreign to him in every respect. He said that he didn't have to know anything about it. He said, "I have absolute confidence in Hugo Malter. He knows the game from A to Z." He did say that Malter had contracted with a man to handle all of that, that they could possibly put out, and that he also went into very minute detail of telling me how the fruit, not only the grapes but any kind of fruit that was going to waste that they might, Mr. Malter said that he might apply it into this, and that it was so cheap and going to waste that it was a wonderful outlet. He seemed to think that there was going to be a fortune in it.

N. LINDSAY SOUTH,

a witness called on behalf of the defendant Coates, being first duly sworn, testified in substance as follows:

(Testimony of N. Lindsay South)

My full name is N. Lindsay South. I was present at a time when Coates and Malter testified when Coates came to my house and asked for a revolver. It was in December 1930, I believe. Just Lloyd and Hugo and myself were there. Stumpf was on the outside. He was never inside. I have no recollection of Stumpf even being there. They came in there very hurriedly, stayed for a few minutes and either Coates or Malter conveyed the idea that they were going up in the mountains to find out what had become of his investment there and there was some talk about bad gunmen up there. I understood Malter had a pistol but Coates didn't have any and they asked me if I had one. I told them that I had one, one that was a good one, the only kind I would keep. He said he was going to go there and find out, it didn't make any difference whether he would come back alive or not. It was Coates who said that so I gave him a pistol that I had, a Colt. They mentioned the fact that they didn't know what became of Stumpf and the money—they had been trying to locate or find out where this so-called investment was. This conversation was about nine o'clock or half past nine in the evening.

Since this trial started I have talked with Hugo Malter on several occasions. I talked with him on Wednesday evening. That would be October 7th. I talked with him on Wednesday and Thursday and Saturday. Malter came to my house; I did not send for him. I had a conversation with Malter regarding the proceedings at this trial.

Q. Did you and Malter have a discussion at that time and place in which Malter in substance told you that he had been given testimony in this trial as it was typed by



(Testimony of N. Lindsay South)

the reporters and that he was directed to read it, and in substance also told that by the Government representative, that the testimony of Mr. Stumpf was not agreeing with what Malter had told them and he wanted him to read it to corroborate Stumpf's testimony if possible, and to reconcile those discrepancies before he went on the stand?

A. Yes.

At this point the defendant Coates, through his counsel, made an offer of certain testimony as follows:

At this time I offer to prove by this witness that Mr. Hugo Malter told this witness on Tuesday night, that the Government not only gave him the testimony but talked to him freely about it, both Mr. Davis and some of the other men in the office and Mr. McNabb; that on Thursday night he came and told Mr. South substantially the same thing and that preparatory to going on the stand on Friday Mr. Malter told Mr. South at that time that he had been kept up with the Government for a long time and that the testimony had not all been written up and that they called in the reporter and the reporter read the unwritten part of his testimony to Malter and that again on Saturday night Malter came to South's house and told South substantially the same thing, and that Malter also told South that Mr. Davis told Malter that he might be out of the conspiracy charge all right, but it was a much more serious thing, that perjury was a much more serious thing, and he should be very careful how he testified.

THE COURT: Now are you attempting to show that Mr. Malter has made any false statements in his testimony on the witness stand?

(Testimony of J. L. Broad)

MR. SAVAGE: Yes, exactly. I asked him those questions and he denied all of them.

THE COURT: Well, I mean outside of those questions?

MR. SAVAGE: Yes. I—

THE COURT: In other words, do you agree that his testimony corresponds with the witness Stumpf?

MR. SAVAGE: Oh, absolutely not. There are many discrepancies.

THE COURT: Very well, do you charge that he changed his testimony in order to agree with the testimony of the witness Stumpf?

MR. SAVAGE: No, I don't say that.

THE COURT: All right. That is enough. The objection is sustained. It is a contradiction on an entirely different matter.

MR. SAVAGE: Well, the proffer was what I made and I understand it was refused?

THE COURT: Yes.

MR. SAVAGE: Please note an exception.

J. L. BROAD,

a witness on behalf of the defendants, after being duly sworn, testified in substance as follows:

My full name is J. L. Broad. I live in Fresno and have lived here about forty years. During the last fifteen or twenty years I have been peace officer. I am now Chief of Police of the City of Fresno. I know Alexander Stumpf. I have known him about fifteen years. I know the general reputation of Alexander Stumpf for truth,

(Testimony of J. L. Broad)

honesty and integrity in this community. It is bad. I would not believe him under oath.

#### CROSS-EXAMINATION

I have known Alexander Stumpf for about fifteen years. He has been a notoriously hard citizen all that time. He has been arrested and convicted and brought up before the courts many, many times. I don't recall how many times that he has been arrested but a great many *time*. I know that we have been after him many times but as to the number of times he has been arrested I would not be able to say. I know that he has been convicted of a felony twice. It is a matter of common knowledge all over Fresno that he is a notorious criminal. I have discussed him with a great many people in the last couple of years. With the people I have discussed it with I would say that his reputation was extremely bad for a number of years.

Here it was stipulated between counsel that if the witness Dr. Ray, who on account of illness was unable to be present, would, if present and under oath, testify that in October 1930 he had a talk with Mr. South with reference to getting someone to invest in the stock of his concern—his medicinal tonic concern manufacturing medicinal preparation of some kind—that some time during the month of October South brought Malter and Coates down to the plant. That in the conversation that occurred there Coates said in the presence of Malter that they had their money tied up in a concentrate business, and just as soon as they could get it out of the concentrate business or out of this business that it was invested in that they might be interested in the stock.

(Testimony of W. G. Phillips)

W. G. PHILLIPS,

a witness called on behalf of the defendant Coates, testified in substance as follows:

(This witness had been called by the defense and testified out of order during the taking of testimony on behalf of the Government.)

My name in full is W. G. Phillips. I reside at Hanford. I am a petroleum chemist. I have been in the oil business for twenty-five years. My present business is refining. I have a refinery. I merchandise the Kettleman Hills gasoline. I know defendant Lloyd Coates. I have known him six years. I have had various business transactions with Coates during that period. I met Hugo Malter once. It was about a year ago the 15th or 20th of October, 1930. I met him at Coates' house about nine P. M. Malter and Coates and myself were present. I heard a conversation between Coates and Malter with reference to a grape syrup business—a proposition for entering into the manufacture of grape syrup was the topic of discussion between the gentlemen besides myself. The manufacture of grape syrup was discussed. Malter explained how grape syrup was manufactured. I think Malter knew I was a chemist. They discussed the character of raw material and the price thereof and the price of the finished product and they mentioned that the business carried a good return on the investment. The remark was made that raw material was so cheap that it was being fed to the hogs. By raw material I mean grapes from which the concentrate was to be made. Coates wanted to know if I would be interested financially



(Testimony of Francis Morin)

with such a project. He said something about my being interested to the extent of \$3000, a portion allotted to Coates and to Malter. The conversation lasted twenty or thirty minutes.

### FRANCIS MORIN,

a witness called on behalf of the defendant Coates, testified in substance as follows:

(This witness had been called by the defense out of order during the taking of testimony on behalf of the prosecution.)

My full name is Francis Morin. I reside at Alameda, California. I have resided about three and one-half years there. My business is the refining of oils, mineral oils. I know defendant Coates. I have known him for about three years. I have done business with him most of that time. I have met Hugo Malter. I met Malter on the 12th of December of last year at the Hotel Fresno in this city. I had to visit Coates on business. He was at the hotel and I called on him there. I called on him about the oil business. Malter was there. Malter told me at that time that he and Coates were in the syrup business. I don't remember what kind of syrup business. In the conversation after Malter had mentioned that they were in the syrup business, Coates and I were discussing a business deal whereby he was purchasing quite a volume of lubricating oil, and it so happened that he wanted that oil packed in five gallon cans. I wasn't familiar with the price of cans, nor was Coates. Malter volunteered the information and was very definite that those cans could be purchased for fifteen cents apiece in the volume we were

(Testimony of Francis Morin)

discussing. He said he knew it because he was familiar with the purchasing of cans. He mentioned that in the syrup business it was necessary to have his cans lacquered on the inside. They were a little more expensive but the plain cans he was sure could be purchased for fifteen cents. I took his word for that. Later on I found that in completing arrangements for the deal, purchasing cans, it meant one hundred and two hundred dollars difference to me, which naturally I had to stand because we made a definite arrangement. This was on the 12th of December 1930.

At this point all the defendants rested.

At this point the court announced that counsel might take two hours on each side to argue the case and that the defendants must arrange the time to be taken by each among themselves.

Counsel for defendant Coates entered no objection to this ruling of the court and made no request for more time to argue the case.

MR. McNABB: Do I understand now that all defendants rest at this time?

MR. SAVAGE: Yes.

MR. CURRAN: I don't know whether it is a proper thing to do or not, but I will take exception to the ruling of the court limiting the time of argument as being prejudicial to the defendant Brix.

THE COURT: You want more time, is that the idea.

MR. SAVAGE: Exception.

MR. LINDSAY: I would like to have more.

THE COURT: Gentlemen, I feel this way, that the facts of this case, or rather the questions that the case

(Testimony of Francis Morin)

will determine or will turn upon is quite clear, and if, in fact, I question whether the limit given is not an excessive limit in view of the entire complexion of the case. I don't think any injustice is being done to anybody by reason of the limits based upon the time. \*\*\*\*\*

THE COURT: No, the case must go to the jury today.

MR. LINDSAY: Note an exception.

MR. SAVAGE: I would like to note an exception on the same basis.

The defendant Coates, through his counsel, then and there asked the court to instruct the jury to return a verdict of not guilty on the ground that the evidence was and is insufficient to justify any other verdict, than a verdict of not guilty, on the first count, the second count, the third count and the fourth count of the indictment.

The request was by the court denied, to which ruling of the court the defendant Coates then and there duly excepted.

The cause was thereupon argued by respective counsel and thereafter, and after being instructed by the court, the jury retired in charge of an officer to deliberate upon its verdict.

Subsequently the jury returned into court and announced its verdicts in due form, wherein it found the defendant Coates guilty as charged in the indictment on counts one and four of said indictment, and not guilty on counts two and three of said indictment.

Subsequently the defendant Coates was arraigned before the court for sentence and judgment and thereupon made and filed a motion for a new trial upon the grounds

(Testimony of Francis Morin)

(1) that the verdict of the jury is contrary to law; (2) that the verdict is contrary to the evidence; (3) that there was no evidence to support the verdict on the first count of the indictment; (4) that there was no evidence to support the verdict on the fourth count of the indictment; (5) that the court erred in denying defendant's motion for a directed verdict, and (6) that the court erred in the decision of certain questions of law during the trial of said cause and in limiting a time for the argument of said cause on behalf of the defendant Coates to forty minutes.

The motion for a new trial so made by said defendant Coates was by the court denied, to which ruling of the court the said defendant Coates, through his counsel, then and there duly excepted.

The court thereupon proceeded to pronounce sentence and judgment upon the defendant Coates and ordered that as a punishment under the first count of the indictment the said defendant Coates be imprisoned in the Federal Penitentiary, at McNeil's Island, for a period of one year and one day, and that in addition the said defendant Coates pay a fine of \$1000.00 under said first count of said indictment, and that under the fourth count of said indictment the said defendant Coates pay a fine of \$100.00.

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IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff above named, United States of America, and the defendant J. L. Coates, that the foregoing Bill of Exceptions contains all of the evidence



given or offered on the trial of the above entitled action, and correctly shows the proceedings had on said trial, and that said Bill of Exceptions is correct in all respects and may be by the Court approved, allowed, settled and made a part of the record on appeal by said defendant J. L. Coates herein.

Dated: January 7th, 1932.

SAMUEL W. McNABB,  
United States Attorney for the Southern District of  
California,

By P. V Davis  
Asst. United States Attorney  
David E. Peckinpah

Attorney for defendant and appellant J. L. Coates

The above and foregoing constitutes a true and correct Bill of Exceptions, which contains all of the evidence given or offered on the trial of the above entitled action, and correctly shows the proceedings had on said trial, and said Bill of Exceptions is correct in all respects and is hereby approved, allowed, settled and authenticated and made a part of the record on appeal by defendant J. L. Coates.

Dated: January 7, 1932.

Geo Cosgrave  
United States District Judge for the Southern District  
of California.

[Endorsed]: Filed Jan 7-1932 R. S. Zimmerman,  
Clerk By Theodore Hocke Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

(1528-C-Criminal)

IT IS HEREBY STIPULATED by the United States Attorney for the Southern District of California that the time for filing the Bill of Exceptions for appellant, J. L. COATES, may be extended to and including December 10, 1931.

DATED this 5th day of November 1931.

SAMUEL W. McNABB,  
U. S. Attorney

By P. V. Davis  
Assistant U. S. Attorney

IT IS SO ORDERED

Geo. Cosgrave  
U. S. DISTRICT JUDGE

[Endorsed]: No. 1528-C-Crim United States District Court Southern District of California Central Division United States of America, Plaintiff, vs. Alexander Stempf, et al, Defendants. Stipulation and Order Filed Nov 5 1931 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 1528-C-Cr.

ORDER

Upon application of the United States Attorney of the Southern District of California and P. V. Davis, Assistant United States Attorney for said District,

IT IS HEREBY ORDERED that the time within which the above named appellee, United States of America, through its said attorneys may file and serve proposed amendments to the proposed bill of exceptions of the defendant J. L. Coates is hereby extended to and including the 15th day of December, 1931.

Dated: November 30th, 1931.

Geo. Cosgrave

United States District Judge

[Endorsed]: Filed Nov 30 1931 R. S. Zimmerman,  
Clerk By: Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 1528-C-Cr.

STIPULATION

IT IS HEREBY STIPULATED that the Government may have until December 31st, 1931 in which to file proposed amendments to the respective proposed bills of exceptions of each of said appellants and that the court may enter an order herein extending the time accordingly.

Dated: December 21, 1931

SAMUEL W. McNABB

United States Attorney,

P. V. Davis

P. V. DAVIS,

Assistant United States Attorney  
Attorneys for Plaintiff and Appellee.

David E. Peckinpah,

DAVID E. PECKINPAH,

Attorney for J. L. Coates and D. Arkalian, Appellants.

It is so ordered

Geo. Cosgrave

Judge

Dated Dec. 23, 1931

[Endorsed]: Filed Dec. 23, 1931 R. S. Zimmerman,  
Clerk By: Thomas Madden, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 1528-C

SUBSTITUTION OF ATTORNEY.

To the plaintiff above named, and to  
SAMUEL W. McNABB, United States Attorney:

You will please take notice that defendant J. L. Coates,  
above named, has changed attorneys in the above entitled  
action, and that

DAVID E. PECKINPAH

has been and is hereby substituted in the place of the  
undersigned as attorney for defendant J. L. COATES.

DATED: NOVEMBER 14th 1931.

H. A. Savage

Attorney for Defendant J. L. COATES

The above substitution of attorneys is hereby made by  
the defendant, J. L. COATES, and the undersigned  
hereby consent thereto.

DATED: NOVEMBER 14th, 1931

J. L. Coates

Defendant

N. Lindsay South

Attorney for Defendant J. L. COATES

[Endorsed]: Filed Nov 20, 1931 R. S. Zimmerman,  
Clerk By Theodore Hocke Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 1528-C-Cr.

### MOTION FOR NEW TRIAL

Comes now the defendant, J. L. COATES, and moves this Honorable Court for a new trial, and for cause thereof says:

#### I.

The verdict of the jury is contrary to law.

#### II.

The verdict is contrary to the evidence.

#### III.

There was no evidence to support the verdict on the first count of the indictment.

#### IV.

There was no evidence to support the verdict on the fourth count of the indictment.

#### V.

The court erred in requiring the defendants to exercise a peremptory challenge with only eight prospective jurors in the jury box.

#### VI.

The court erred in denying this defendant's motion for a directed verdict.

#### VII.

The verdict on the first count of said indictment is unlawful and invalid for the reason that the transaction referred to and described as being the object of the conspiracy alleged in the first count of said indictment is the same transaction set forth and described as having been completed in the fourth count of said indictment.

VIII.

The court erred in overruling the objection of this defendant to the question asked the Government's witness Alexander Stumpf:

"Q And on a card identically like that, yellow card that you see there?

"A Yes, sir.

"Mr. McNABB: We offer it in evidence if the Court please.

"MR SAVAGE: Well, I want to object to the admission of that in evidence, and also, to the method of examination of this witness at this time." Rep. Tr. pg. 326.  
And permitting the same to be received in evidence.

IX.

The court erred in overruling the objection of this defendant to the question asked the Government's witness Alexander Stumpf:

"Q Now, I will ask you what name you introduced Mr. Coates to Proctor and Kenny under?" Rep. Tr. pg. 399.

And permitting the witness to answer the same.

X.

The court erred in making the following statement during the course of the trial, in the presence of the jury:

"THE COURT: It seems to me the presumption would be that everything was voluntary. And particularly with respect where the officers of the Government are concerned. It seems to me that would be immaterial at this time, and irrelevant and incompetent." Rep. Tr. pg. 403.

## XI.

The court erred in admitting in evidence Government's exhibit No. 6. Rep. Tr. pg. 480. (The same being one-half gallon bottle of "mash".)

## XII.

The court erred in denying the following motion of this defendant with respect to the testimony of Government's witness Fred Stribling:

"MR SAVAGE: May I make this further motion, that all this testimony be stricken from the record. As I understand the indictment there is charged that a conspiracy to possess and manufacture a still, not to manufacture liquor. A reading of the indictment will show that, the possession of a still without a permit, and engaging in the business of distillers without giving a bond and possession of a still in violation of section 25 of the National Prohibition Act. There is no question about the possession of liquor or manufacturing of liquor or alcohol or anything else." Rep. Tr. pg. 486.

## XIII.

The court erred in denying and overruling the objection of this defendant to the testimony of the Government's witness Ferdinand Andreas:

"MR SAVAGE: May I at this time interpose an objection to all this testimony as incompetent, irrelevant, immaterial, not within the issues and not within the charge of the case. There is no charge here that there was anything done at Caruthers, but that they conspired to build a still at the Foss ranch." Rep. Tr. pg. 500.

## XIV.

The court erred in overruling the objection of this defendant to the question asked Government's witness Ferdinand Andreas:

"Q What was said by Mr. Coates about your signing this affidavit?" Rep. Tr. pg. 515,  
And permitting the said witness to answer the same.

## XV.

The court erred in admitting in evidence Government's exhibits 1, 2 and 3. Rep. Tr. pg. 547. (The same being parts of a "still")

## XVI

The court erred in overruling the objection to the question asked Government's witness James Proctor:

"Q Well now, think that over carefully. I wish you would look at this statement here for the purpose of refreshing your memory." Rep. Tr. pg. 621, line 17.  
And permitting the witness to look at said statement handed him by the U. S. Attorney.

## XVII.

The court erred in denying the motion of this defendant to exclude the Government's witness G. H. Malter from the witness stand on the ground that he had read excerpts from the transcript of testimony of other witnesses for the Government, said transcript being furnished and showed to him by the U. S. Attorney. Rep. Tr. pg. 667 et seq.

## XVIII.

The court erred in permitting the Government to introduce in evidence the statement of Olie Olson, Government's exhibit No. 8, and in permitting the Government to read the entire statement to the jury. Rep. Tr. pg. 702.

## XIX.

The court erred in overruling the objection of this defendant to the question asked the Government's witness Wilbert G. Whitfield:



“Q Did not Mr. Brix offer to plead guilty?” Rep. Tr. pg. 743

## XX.

The court erred in denying the motion of this defendant for permission to examine Government’s witness G. H. Malter as to the fact and circumstances of his reading the transcript of testimony of other Government witnesses, after all witnesses had been excluded from the court room. Rep. Tr. pg. 757, line 20.

## XXI.

The court erred in denying the motion of this defendant to strike from the record the following statement of the U. S. Attorney to the Government’s witness G. H. Malter:

“You know what happened.” Rep. Tr. pg. 771, line 23.

## XXII.

The court erred in admitting in evidence Government’s exhibit No. 5. Rep. Tr. pg. 798. (Yellow card)

## XXIII.

The court erred in overruling the objection of this defendant to the question asked Government’s witness G. H. Malter:

“Q Anything else? Anything said in reference to getting any of it, any more of it?” Rep. Tr. pg. 817.  
And permitting the witness to answer the same.

## XXIV.

The court erred in denying this defendants motion to strike out the answer of the Government’s witness G. H. Malter:

“A The only time that I remember that the grape concentrate deal was being mentioned was when Mr. Coates used it as an alibi once to get away from home.” Rep. Tr. pg. 839, line 1.

## XXV.

The court erred in denying the motion of the defendant Theodore Brix (in which this defendant joined) to exclude any and all of the testimony of Government's witness G. H. Malter, on the ground that after having been put under the rule, that he violated said rule by reading excerpts of the testimony of other Government witnesses, before he, the said G. H. Malter, was called to the witness stand by the Government, and that the U. S. Attorney furnished him the said transcript of testimony of other witnesses for the Government. Rep. Tr. pg. 851, line 10.

## XXVI.

The court erred in making the following ruling during cross-examination of Government's witness G. H. Malter:

"THE COURT: That is enough along that line. The witness is clearly indistinct." Rep. Tr. pg. 899, line 23, the said ruling tending to hinder and prevent cross-examination of the Government's witnesses.

## XXVII.

The court erred in sustaining the Government's objection to the following question asked Government's witness G. H. Malter on cross-examination:

"Q Do you remember at that time telling me that you had him where he could not say a word because you had it in Coates' own handwriting where it showed what it cost to make alcohol and that he was engaged in the still business and that you had that memorandum and you were going to keep it?" Rep Tr. pg. 928, line 9.  
And preventing the witness from answering the same.

## XXVIII.

The court erred in sustaining the Government's objection to the question asked defendant's witness W. D. Coates:

"Q. What was said at that time?" Rep. Tr. pg. 990, line 18,

And preventing the said witness from answering the same.

## XXVIX.

The court erred in denying the proffer of proof made by this defendant, while defendant's witness N. Lindsay South was on the witness stand, as follows:

"Mr. SAVAGE: At this time, I offer to prove by this witness that Mr. Hugo Malter told this witness on Tuesday night, that the Government not only gave him the testimony but talked to him freely about it, both Mr. Davis and some of the other men in the office, and Mr. McNabb. That on Thursday night he came and told Mr. South substantially the same thing and that preparatory to going on the stand on Friday, Mr. Malter told Mr. South at that time that he had been kept up with the Government for a long time and that the testimony had not all been written up and that they called in the reporter and the reporter read the unwritten part of his testimony to Mr. Malter, and that again on Saturday night Mr. Malter came to Mr. South's house and told Mr. South substantially the same thing, and that Mr. Malter also told Mr. South that Mr. Davis told Mr. Malter that he might be out of the conspiracy charge all right but it was a much more serious thing, that perjury was a much more serious thing, and he should be very careful how he testified" Rep. Tr. pg. 1000.

XXX.

The court erred in overruling the objection of this defendant to the question asked the witness J. L. Broad by the Government on cross-examination:

“Q Everybody knew it?” Rep. Tr. pg. 1007, line 16,  
And permitting the witness to answer the same.

XXXI.

The court erred in limiting the time for the argument on behalf of this defendant to forty minutes. Rep. Tr. pg. 1014.

For each and all of the foregoing reasons and errors this defendant, J. L. COATES, moves the Honorable George Cosgrave, Judge of said United States District Court, for a new trial of said cause.

Dated: October 24th, 1931

H. A. Savage

N. Lindsay South

Attorneys for Defendant J. L. Coates.

[Endorsed]: Filed Oct 24, 1931 R. S. Zimmerman,  
Clerk By Francis E. Cross Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 1528-C-CR.

PETITION FOR APPEAL

TO THE HONORABLE GEORGE COSGRAVE,  
JUDGE OF THE DISTRICT COURT OF THE  
UNITED STATES IN AND FOR THE SOUTH-  
ERN DISTRICT OF CALIFORNIA:

J. L. COATES, your petitioner, one of the defendants in the above entitled cause, prays that he may be per-



mitted to take an appeal from the judgment against him entered in the above cause on the 19th day of October, 1931, pursuant to the verdict of the jury given and entered in said cause on the 15th day of October, 1931, to the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner does hereby appeal from said judgment to the said United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith.

Your petitioner desires that said appeal shall operate as a supersedeas, and, therefore, prays that an order be made fixing the amount of security which said defendant, petitioner and appellant, shall give and furnish upon such appeal; and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further prays that he be released on bail, in an amount to be fixed herein, pending the final disposition of said appeal.

Dated: October 24th, 1931.

H. A. Savage

N. Lindsay South

Attorneys for Petitioner and Appellant.

[Endorsed]: Filed Oct 24 1931 R. S. Zimmerman,  
Clerk By Francis E. Cross Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 1528-C-CR.

### ASSIGNMENT OF ERRORS

Comes now J. L. Coates, appellant and one of the defendants in the above entitled cause, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this Court entered on the 24th day of October, 1931, to-wit:

#### I.

The judgment entered by the above entitled court against this defendant and appellant, because of his conviction by the jury on the first count of the indictment herein, is unlawful and invalid, for the reason that the verdict of the jury finding this defendant and appellant guilty of said first count is against the evidence.

#### II.

That the said judgment so entered by this Court against this defendant and appellant on the said first count of the said indictment is unlawful and invalid, for the reason that it is against the law.

#### III.

That the judgment entered by the above entitled court against this defendant and appellant, because of his conviction by the jury on the fourth count of the indictment herein, is unlawful and invalid, for the reason that the verdict of the jury finding this defendant and appellant guilty of said fourth count of said indictment is against the evidence.

## IV.

That the said judgment so entered by this court against this defendant and appellant on the said fourth count of the said indictment is unlawful and invalid, for the reason that it is against the law.

## V.

That the said judgment so entered against this defendant and appellant on the first count of said indictment is invalid and unlawful, for the following reason, to-wit: That the transaction referred to and described as being the object of the conspiracy alleged in the first count of said indictment is and was the same transaction set forth and described as having been completed in the fourth count of said indictment.

## VI.

That the trial court erred in matters of law and in its decisions upon matters of law arising during the trial of this cause, to the prejudice of this defendant and appellant in the following particular, to-wit: That the said court erred in denying the motion of this defendant and appellant for a directed verdict in said cause.

## VII.

That the said court erred in overruling the objection of this defendant and appellant to the question asked the Governments' witness Alexander Stumpf, and in permitting the introduction in evidence of Government's exhibit No. 4, as follows:

"Q And on a card identically like that yellow card that you see there?

"A Yes, sir.

"MR McNABB: We offer it in evidence if the Court please.

“MR SAVAGE: Well, I want to object to the admission of that in evidence, and also, to the method of examination of this witness at this time.” Rep. Tr. pg. 326.

The said exhibit is a yellow card upon which it is alleged that this defendant and appellant made notations of the cost of various items of machinery, etc., purchased for the alleged enterprise.

### VIII.

The said Court erred in overruling the objection of this defendant and appellant to the question asked the Government’s witness Alexander Stumpf:

“Q Now, I will ask you what name you introduced Mr. Coates to Proctor and Kenney under?” Rep. Tr. pg. 399,

and permitting the witness to answer thereto as follows:

“A Why, I don’t remember under what name, but he gave me some name to introduce him to Proctor and Kenny.”

### IX.

The said Court erred in making the following statement in the presence of the jury during the course of the trial:

“THE COURT: It seems to me the presumption would be that everything was voluntary. And particularly with respect where the officers of the Government are concerned. It seems to me that would be immaterial at this time, and irrelevant and incompetent.” Rep. Tr. pg. 403.

The above statement was made following a motion to strike out the answer of the witness Alexander Stumpf to the question asked him by the Government:



“Q BY MR McNABB: Now, has the Government offered you any inducement or immunity or anything of that kind?

“MR. CURRAN: Just a minute.

“A. No, sir.

“Q BY MR McNABB: By reason of your coming here to testify?”

#### X.

The said Court erred in receiving in evidence Government's exhibit No. 6. Rep. Tr. pg. 480. The said exhibit being a large glass container filled with a liquid which the Government's witness W. G. Whitfield testified (pg. 479) he secured from the gravity tanks on the Foss Ranch, April 8, 1931.

#### XI.

The said Court erred in denying the following motion of this defendant and appellant to strike out testimony of the Government's witness Fred Stribling:

“MR. SAVAGE: May I make this further motion, that all this testimony be stricken from the record. As I understand the indictment there is charged that a conspiracy to possess and manufacture a still, not to manufacture liquor. A reading of the indictment will show that, the possession of a still without a permit, and engaging in the business of distillers without giving a bond and possession of a still in violation of section 25 of the National Prohibition Act. There is no question about the possession of liquor or manufacturing of liquor or alcohol or anything else.” Rep. Tr. pg. 486.

Mr. Stribling testified that he was a chemist (pg. 481) in the Government service; that he tested the contents of Government exhibit No. 6, and found it to be mash con-

taining 3.24 percent alcohol by volume. He testified on cross-examination that he made the test sometime prior to April 17th; and that liquid like that would change from time to time according to conditions that surround it, and that the alcoholic content might increase, depending on the amount of sugar content and heat; and that he could not tell the alcoholic content of that liquid for the months of January and February, 1931; and that he would not say that the liquid had any alcoholic content three months prior thereto.

## XII.

The said Court erred in denying and overruling the objection of this defendant and appellant to the testimony of Government's witness Ferdinand Andreas:

"MR. SAVAGE: May I at this time interpose an objection to all this testimony as incompetent, irrelevant, immaterial, not within the issues and not within the charge of the case. There is no charge here that there was anything done at Caruthers, but that they conspired to build a still at the Foss ranch." Rep. Tr. pg. 500.

Mr. Andreas testified (pg. 499) that he hauled some lumber, nails, hammers, two rolls of black paper, and some turkeys to the Caruthers place, and worked two or three days cleaning out the barn, tore out some manger and leveled up a place in the barn.

## XIII.

That said Court erred in overruling the objection of this defendant and appellant to the question asked the Government's witness Ferdinand Andreas:

"Q What was said by Mr. Coates about your signing this affidavit?" Rep. Tr. pg. 515.

and permitting the witness to answer as follows:

"A Well, he wouldn't give me my pay check unless I signed that affidavit. So me and him—him and I, we drove down town, we tried to get a notary public's office, he wasn't around then, so we gave a check to his manager and told me to come in the morning to have it signed." pg. 516.

The affidavit purports to be an affidavit concerning the pink slip on the Andreas truck, alleged to have been purchased by the defendant Coates.

#### XIV.

The said Court erred in admitting in evidence Government's exhibits Nos. 1, 2 and 3. Rep. Tr. pg. 547. The same being parts of an alleged still.

#### XV.

The said Court erred in overruling the objection to the question asked the Government's witness James Proctor:

"Q Well now, think that over carefully. I wish you would look at this statement here for the purpose of refreshing your memory." Rep. Tr. pg. 621, line 17.

The statement handed the witness purported to be a statement signed by the witness and in the possession of the Government.

#### XVI.

The said Court erred in denying the motion of this defendant and appellant to exclude the Government's witness, George Hugo Malter, from the witness stand, on the ground that he had read portions of the transcript of testimony of other witnesses, furnished him by the Government, prior to his taking the witness stand; all witnesses having theretofore been excluded from the court room by order of the court. Rep. Tr. pg. 667 et seq.

## XVII.

The said Court erred in permitting the Government to introduce in evidence the statement of Olie Olson, Government's exhibit No. 8, and in permitting the Government to read the entire statement to the jury. Rep. Tr. pg. 702. Exception was taken to the reading of the statement for the reason that the said Olie Olson was a defendant and alleged co-conspirator in this case, and that this defendant and appellant would not have the opportunity or privilege of cross-examining the said Olie Olson as to the said statement so read by the Government. The statement was to the effect that Olson met Coates several times out at the St. George Vineyard (Malter's ranch); portions of the statement being as follows: Rep. Tr. pg. 708

"Q When did Coates come out there?

"A He came out there some time after I had started building the still.

"Q Did you have a talk with him?

"A Yes, I had a little conversation with him. Coates did not know anything about this still at all. He had a proposition, he wanted to build a still, too.

"Q Did he say what kind of a still?

"A A whiskey still.

"Q What kind of still, size and what was he going to do with it?

"A He wanted to know about what it would cost, and I told him, I forgot just what I told him, but I didn't see him for quite a while and he never said anything more about it. He said he wanted a still that would run out quite an amount.

"Q Did he say where he was going to put the still, or did he give an order?



"A No. He didn't know anything about the still I was putting up.

"Q When Coates first came out was Hugo Malter there with him? A Yes.

"Q Did Hugo say anything?

"A Malter in the presence of Coates said that Coates himself was going to put up the money for the still but Coates did not know anything about this one that I was building."

The above statement purports to have been made on some day in April, 1931 (Rep. Tr. pg. 716) to the Government officers, and after the termination of the conspiracy, the indictment having been filed April 22, 1931.

#### XVIII.

The said Court erred in overruling the objection to the question asked the Government's witness Wilbert G. Whitfield:

"Q Did not Mr. Brix offer to plead guilty." Rep. Tr. pg. 743, line 3,

and permitting the witness to answer, as follows:

"A Mr. Brix did not offer to plead guilty himself, but—" Rep. Tr. pg. 744, line 6

"A Mr. Fenston said that he was willing to enter a plea of guilty to any misdemeanors on the charge, but he did not like to see the boy do a jail sentence for a conspiracy." Rep. Tr. pg. 745, line 7.

#### XIX.

The said Court erred in denying the motion of this defendant and appellant, as follows:

"MR SAVAGE: I ask permission at this time to examine Mr. Malter as to the true facts." Rep. Tr. pg. 757.

In regard to reading the transcript by the witness

Malter, the Government made a statement to the Court (Rep. Tr. pg. 756) as to the circumstances thereof, following which this defendant and appellant made the above motion.

## XX.

The said Court erred in denying the motion of this defendant and appellant to strike from the record the following statement of the Government to its witness G. H. Malter:

“You know what happened.” Rep. Tr. pg. 771, line 23.

The full question is: “Q Well, go ahead and tell all the conversation. You know what happened. Tell the Court and jury what happened.” Objection is made to the confidential conversational style of the question.

## XXI.

The said Court erred in admitting in evidence Government’s exhibit No. 5. Rep. Tr. pg. 798. The same purporting to be a card written upon by defendant Coates.

## XXII.

The said Court erred in overruling the objection of this defendant and appellant to the question asked the Government’s witness G. H. Malter:

“Q Anything else? Anything said in reference to getting any of it, any more of it?” Rep. Tr. pg. 817, and permitting the witness to answer:

“A He wanted Stumpf to get some, to have drinking liquor.” The witness was referring to what the defendant Coates is alleged to have said.

## XXIII.

The said Court erred in denying the motion of this defendant and appellant to strike out the answer of Government’s witness G. H. Malter:

"A The only time that I remember that the grape concentrate deal was being mentioned was when Mr. Coates used it as an alibi once to get away from home." Rep. Tr. pg. 839, line 1.

#### XXIV.

The said Court erred in denying the motion of the defendant Theodore Brix, in which this defendant and appellant joined, to exclude any and all testimony of the Government's witness G. H. Malter. Rep. Tr. pg. 851, line 10. The motion was based on the ground that the said witness had read portions of the testimony given by Government's witness Stumpf prior to taking the witness stand; all witnesses having been excluded from the court room at the commencement of the trial.

#### XXV.

The said Court erred in making the following ruling, during cross-examination of the Government's witness G. H. Malter:

"THE COURT: That is enough along that line. The witness is clearly indistinct." Rep. Tr. pg. 899, line 23.

#### XXVI.

The said Court erred in sustaining Government's objection to the following question asked Government's witness G. H. Malter on cross-examination:

"Q Do you remember at that time telling me that you had him where he could not say a word because you had it in Coates' own handwriting where it showed what it cost to make alcohol and that he was engaged in the still business and that you had that memorandum and you were going to keep it?" Rep. Tr. pg. 928.

#### XXVII.

The said Court erred in sustaining the Government's objection to the question asked defendant's witness W. D. Coates:

"Q What was said at that time?" Rep. Tr. pg. 990, l. 18.

Before the objection was made, the witness partly answered the question, as follows:

"A We had gone up there, Mrs. Coates and I had gone up there to talk to Mr. McNabb in a general way on the subject of the case. And as we were about to leave the office I was nearest the door, Mr. Whitfield was nearest and there adjacent to me, was Mr. Davis."

The previous question was: "Have you talked with Mr. Whitfield?" he being the Prohibition Agent, to which the witness Coates had replied, "I did." The purpose of the question was to show that Mr. Whitfield told Mr. W. D. Coates that he believed that the defendant Coates started in a grape concentrate syrup deal in the beginning.

#### XVIII.

The said Court erred in denying the proffer of proof made by this defendant and appellant while defendant's witness N. Lindsay South was on the witness stand, as follows: Rep. Tr. pg. 1000.

"MR. SAVAGE: At this time, I offer to prove by this witness that Mr. Hugo Malter told this witness on Tuesday night, that the Government not only gave him the testimony but talked to him freely about it, both Mr. Davis and some of the other men in the office, and Mr. McNabb. That on Thursday night he came and told Mr. South substantially the same thing and that preparatory to going on the stand on Friday, Mr. Malter told Mr. South at that time that he had been kept up with the Government for a long time and that the testimony had not all been written up and that they called in the reporter and the reporter read the unwritten part of his testimony to Mr. Malter, and that again on Saturday night Mr. Malter came to Mr. South's house and told Mr. South substan-



tially the same thing, and that Mr. Malter also told Mr. South that Mr. Davis told Mr. Malter that he might be out of the conspiracy charge all right but it was a much more serious thing, that perjury was a much more serious thing, and he should be very careful how he testified."

## XXIX.

The said Court erred in overruling the objection of this defendant and appellant to the question asked the witness J. L. Broad by the Government on cross-examination:

"Q Everybody knew it?" Rep. Tr. pg. 1007, line 16. and permitting the witness to answer:

"A Yes."

The witness was the Chief of Police of Fresno, and the question was whether everybody knew that Alexander Stumpf was a notorious criminal.

## XXX.

The court erred in limiting the time for the argument of the case to the jury, on behalf of this defendant and appellant, to forty minutes. Rep. Tr. pg. 1014.

WHEREFORE, the said defendant and appellant, J. L. Coates, prays that the said judgment be reversed, and for such other and further relief as to the Circuit Court of Appeals may seem just and proper.

DATED: October 24, 1931.

H. A. Savage

N. Lindsay South

Attorneys for Defendant and Appellant J. L. Coates

[Endorsed]: Filed Oct 24, 1931 R. S. Zimmerman,  
Clerk By Francis E. Cross Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

No. 1528-C.CR.

ORDER ALLOWING APPEAL WITH SUPERSEDEAS, AND FIXING BAIL.

The petition of J. L. COATES, one of the defendants in the above entitled cause, for an appeal from the final judgment therein, is hereby granted and the appeal is allowed;

And upon petitioner filing a bond for the sum of \$10,000. with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above entitled cause, and shall suspend and stay all further proceedings in this Court until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

It is further ORDERED, that the said J. L. Coates, defendant as aforesaid, shall be admitted to bail upon his entering into a good and sufficient bond in the sum of \$10,000. to be conditioned as required by law, with sureties to be approved by the Clerk of said District Court.

Dated: October 24, 1931.

Geo. Cosgrave,  
District Judge

[Endorsed]: Filed Oct 24, 1931 R. S. Zimmerman,  
Clerk By Francis E. Cross Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 1528-C-CR

## BOND ON APPEAL AND BAIL BOND.

KNOW ALL MEN BY THESE PRESENTS:

THAT, I, J. L. COATES, Principal, and E. Pearl Coates of the County of Fresno, State of California; and K. Arkalian, of the County of Madera, State of California, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Ten Thousand Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of January in the year of our Lord, One Thousand Nine Hundred and Thirty-two (1932)

Whereas, lately on the 24th day of October, 1931, at a term of the United States District Court for the Southern District of California, Northern Division, holden at Fresno, California, in a cause pending in said Court between the United States of America, Plaintiff, against J. L. Coates, et al., Defendants, a judgment and sentence was rendered against said defendant J. L. Coatesm and said J. L. Coates obtained and Order from Hon. George Cosgrave, Judge of said District Court, permitting the said defendant J. L. Coates to appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit.

NOW, the condition of said obligation is such, that if the said defendant J. L. Coates shall appear in person in

the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument, or when required by law or rule of said Circuit Court, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Circuit Court in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, and shall pay any fine or fines imposed upon him in said cause, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the above entitled District Court on such day or days as may be appointed for a retrial by said District Court, and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

Dated: January 21st, 1932.

J. L. Coates [Seal]

E. Pearl Coates [Seal]

K. Arakalian [Seal]

APPROVED:

Geo. Cosgrave

District Judge

Dated: January 22nd, 1932.

UNITED STATES OF AMERICA )  
SOUTHERN DISTRICT OF CALIFORNIA ) SS.

K. ARKELIAN, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being



first duly sworn, deposes and says: That I am a householder in said District and reside at Madera, California, in the County of Fresno, State of California, and my occupation is Rancher. That I am worth the sum of Ten Thousand and no/100 (\$10,000.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities, and exclusive of property exempt from execution, and that my property now standing of record in my name consists in part as follows:

Real Estate described as follows:

100 acres of vineyard—value Forty Thousand (\$40,000.00) Dollars clear—eighty-five per cent (85%) of stock of Arkelian, Inc., Seventy Thousand (\$70,000.00) Dollars savings account—Bank of America National Trust and Savings Bank.

That the encumbrances on the foregoing property are as follows:

That my total net assets, above all liabilities and obligations on other bonds, in the sum of One Million (\$1,000,000) Dollars. That I am.....surety upon one outstanding penal bonds (made within one year from date hereof) now in force, aggregating total penalty of Ten Thousand (\$10,000.00) Dollars.

K. Arakelian

Subscribed and sworn to before me this 21st day of January, 1932.

Samuel F. Hollins

U. S. Commissioner for the Southern District of  
California, Northern Division

[Seal]

[Sea1]

I hereby certify to the sufficiency of the sureties on the foregoing bond. JAN 21 1932

Samuel F. Hollins

U. S. Commissioner for the Southern District  
of California, Northern Division

The foregoing bond is hereby approved as to form.

P. V. Davis

Asst. United States Attorney.

The foregoing bond is hereby approved.

Geo. Cosgrave

United States District Judge.

[Endorsed]: Filed Jan 22 1932 R. S. Zimmerman,  
Clerk By Theodore Hocke, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 1528-C.CR.

STIPULATION ON FORM OF TRANSCRIPT,  
AND ORDER THEREON.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that in printing the transcript of the record on appeal herein the designation "Title of Court and Cause" may be used in lieu of the full title, and that the full endorsement of the Clerk filing pleadings, papers and other formal matters may be omitted and in lieu thereof a statement shall be made that the document is filed, date thereof, and signature of the Clerk. In each instance the pleading or docu-

ment so printed shall be identified by the number of this action in the trial court, to-wit, 1528-C-CR.

Dated: October 28, 1931.

SAMUEL W. McNABB,  
United States Attorney,  
By P. V. Davis  
Assistant U. S. Atty  
H. A. Savage  
N. Lindsay South  
Attorneys for Defendant and  
Appellant J. L. COATES

SO ORDERED: Oct. 31, 1931.

Geo. Cosgrave  
U. S. Judge

[Endorsed]: Filed Oct 31, 1931 R. S. Zimmerman,  
Clerk By Francis E. Cross Deputy Clerk

---

[TITLE OF COURT AND CAUSE.]

No. 1528-C.CR.

PRAECIPE FOR TRANSCRIPT OF RECORD FOR  
APPEAL

To the Clerk of the above entitled Court:

You will please prepare and certify a copy of papers filed and proceedings had in the above entitled cause, as are necessary to a determination of the appeal of this defendant and appellant by the Circuit Court of Appeals for the Ninth Circuit; said transcript to include Indictment, Plea, Verdict, Judgment, Petition for Appeal, Order Allowing Appeal, Bond on Appeal, Assignment of Errors



and Prayer for Reversal, Citation, Praecipe for Transcript, and Bill of Exceptions.

Dated: October 27, 1931.

H. A. SAVAGE

N. LINDSAY SOUTH

Attorneys for Defendant and  
Appellant J. L. Coates

[Endorsed]: Filed Oct 28, 1931 R. S. Zimmerman,  
Clerk By Francis E. Cross Deputy Clerk

---

[TITLE OF COURT AND CAUSE.]

No. 1528-C Cr.

To the Clerk of Said Court:

Sir:

Please issue transcript on the appeal of J. L. Coates and include therein the following:

1. Indictment
2. Minutes showing arraignment and plea.
3. Record of Trial.
4. Verdict of the Jury.
5. Motion for new trial and order denying same.
6. Motion in arrest of judgment, and order denying same.
7. Sentence and Judgment.
8. Notice of Appeal, Supersedeas, and Order Allowing Same.

9. Assignment of Errors.
10. Bill of Exceptions and Order Settling and Allowing Bill of Exceptions.
11. Citation on Appeal
12. Substitution of Attorneys
13. All Stipulations and Orders Extending Time to Propose, Amend or Settle Bill of Exceptions and Extending Term.
14. All Stipulations heretofore or hereafter filed, and Orders thereon relative to the printing as part of record exhibits introduced at trial.

DATED this ..... day of January, 1931.

David E. Peckinpah

Atty for J. L. Coates.

[Endorsed]: Received copy of above this January 7, 1932 P. V. Davis Asst. U. S. Atty Filed Jan 7, 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 1528-C

## CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 221 pages, numbered from 1 to 221 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; indictment, minutes of the court; verdict; sentence; bill of exceptions of J. L. Coates; stipulations and orders extending time; substitution of attorney; motion of new trial; petition for appeal; assignment of errors; order allowing appeal; bond on appeal and bail bond; stipulation on form of transcript and order thereon, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$            and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this..... day of March in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,

Clerk of the District Court of the  
United States of America in and  
for the Southern District of  
California.

By

Deputy.





No. 6792.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff,*

VS.

ALEXANDER STUMPF, J. L. COATES,  
OLIE OLSON, THEODORE BRIX, ZONE  
KIRKORIAN, D. ARKALIAN, JAMES  
PROCTOR AND EUGENE L. KENNEY,

*Defendants.*

J. L. COATES,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

OPENING BRIEF OF J. L. COATES,  
APPELLANT.

EDWIN V. MCKENZIE,

HARRY GOTTESFELD,

GEORGE C. CARMODY,

*Attorneys for Appellant Coates.*

FILED

APR 15 1932

PAUL P. O'BRIEN,

CLERK



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No. 6792.

IN THE  
**United States Circuit Court of Appeals**  
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UNITED STATES OF AMERICA,

*Plaintiff,*

VS.

ALEXANDER STUMPF, J. L. COATES,  
OLIE OLSON, THEODORE BRIX, ZONE  
KIRKORIAN, D. ARKALIAN, JAMES  
PROCTOR AND EUGENE L. KENNEY,

*Defendants.*

J. L. COATES,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

**OPENING BRIEF OF J. L. COATES,  
APPELLANT.**

---

**THE INDICTMENT.**

Appellant and seven others were charged in an indictment filed April 22, 1931, containing four counts, as follows:

First Count: Conspiracy to violate the Prohibition Act, Sections 3 and 25 of Title Two thereof, to manu-

facture and possess apparatus designed for the manufacture of intoxicating liquors fit for beverage purposes and to contain more than one-half of one per cent of alcohol by volume, between September 1, 1930, and April 21, 1931.

Second Count: Defendants were charged with having in their possession and control one still and distilling apparatus set up at the Foss Ranch, forty-five miles from Fresno, none of the defendants having or intending to have a permit for that purpose from any authorized official.

Third Count: Defendants were charged with carrying on the business of distillers on said Foss Ranch without giving bond and with intent to defraud the United States of taxes.

Fourth Count: Defendants were charged with having on February 1, 1931, near Fresno, the possession of property and apparatus designed and intended by them for the manufacture of intoxicating liquor for beverage purposes, containing alcohol in excess of one-half of one per cent by volume, in violation of Section 25 of Title Two of the Prohibition Act.

There are ten overt acts set out in count one, none of which alleges an act done in violation of Section 3 of the National Prohibition Act. The charging clause of the conspiracy count alleges that the defendants unlawfully conspired to manufacture and possess apparatus intended and designed for the manufacture of intoxicating liquor, which would be in violation of Section 25 of the Prohibition Act, and would not be covered in Section 3 of that act; but said charging part does not allege that the defendants had or possessed *any liquor*

designed for the manufacture of liquor intended for use in violation of Section 3 of Title Two of the Prohibition Act. This failure to so allege becomes important to a consideration of the error of the court in admitting certain evidence, to be hereinafter referred to.

### **ASSIGNMENT OF ERRORS.**

#### **I.**

Count No. 1 of the indictment does not state facts sufficient to charge an offense under the laws of the United States.

#### **II.**

The evidence is insufficient to support the verdict.

#### **III.**

The verdict is contrary to law and is without necessary evidentiary support.

#### **IV.**

The trial Court erred in denying the motion of appellant for a directed verdict at the conclusion of all the evidence. (Tr., p. 186.)

#### **V.**

The Court erred in receiving in evidence Government's Exhibit No. 6 (Tr., p. 113). The said exhibit being a large glass container filled with a liquid which the Government's witness, W. G. Whitfield, testified he secured from the gravity tanks on the Foss Ranch April 8, 1931.



## VI.

The Court erred in denying the motion of the appellant to strike out the testimony of the Government's witness, Fred Stribling, who testified that he tested the contents of Government Exhibit No. 6 and found it to be mash containing 3.24 per cent alcohol by volume.

## VII.

The Court erred in admitting in evidence Government Exhibits Nos. 1, 2 and 3, the same being parts of an alleged still.

## VIII.

The Court erred in denying the motion of this appellant to exclude the Government's witness, George Hugo Malter, from the witness stand on the ground that he had read portions of the transcript of testimony by other witnesses furnished him by the Government prior to his taking the witness stand; all witnesses having theretofore been excluded from the courtroom by order of the Court.

## IX.

The Court erred in permitting the Government to introduce in evidence the statement of Olie Olson, Government's Exhibit No. 9, and in permitting the Government to read the entire statement to the jury.

## X.

The Court erred in permitting the Government to introduce evidence of the Brix-Stumpf-Malter com-

bination, it being shown conclusively by the evidence introduced by the Government that that conspiracy had ended and terminated prior to the time of the claimed conspiracy or agreement between Coates-Malter-Stumpf.

## XI.

The trial Court erred in denying to the defendant Coates the right to cross-examine the Government witness Malter, to show his bias, interest and motive for testifying against Coates. (Tr., p. 170.)

## XII.

The trial Court erred in permitting the witness Malter to testify that at the Hotel Fresno the defendant Coates and one Morin were never capable of conversation and were intoxicated, and in refusing to strike that testimony, request having been duly made, on the ground that said testimony tended to degrade Coates and had no tendency to prove any act charged under any count of the indictment or any issue tendered in the case.

## FACTS.

Coates was found guilty as charged in counts 1 and 4 and not guilty of the charges contained in counts 2 and 3 of the indictment and is the appellant. Defendant Kenney pleaded guilty to the four counts. Defendant Stumpf pleaded guilty to counts 1 and 4. Defendant Kirkorian pleaded guilty to the first and not guilty to the second, third and fourth counts. Defendants Olson, Brix, Proctor, Coates and Arkalian pleaded not guilty to all counts. Olson was found

guilty on the first count, Brix found not guilty. Arkalian was found guilty on counts 1, 2 and 4. Stumpf, who had pleaded guilty on counts 1 and 4, was given probation on count 1 and fined five hundred dollars on count 4. Kenney, who pleaded guilty to all counts, was likewise given probation.

The evidence upon which the conviction of Coates in the main rests was that given by Stumpf, who had theretofore been twice convicted of felonies against the Government and had pleaded guilty to counts 1 and 4 of this indictment. (Tr., p. 84.)

Besides being an accomplice, Stumpf, according to his own testimony, had engaged in two distinct conspiracies or combinations; the first, the Stumpf, Brix, Malter combination, and the second the Stumpf, Malter, Coates combination; that these combinations or conspiracies were distinct and separate and in each of them his object was to, in combination No. 1, defraud Brix of money, and in combination No. 2, defraud Coates of money. (Tr., pp. 88-89; Tr., pp. 90-91.) That the Brix combination had ended and Brix withdrew before the Coates combination was begun. (Tr., p. 93.) That these two combinations never got together. Stumpf's testimony is as follows:

"The Coates-Malter-Stumpf and the Malter-Brix combinations never did get together. They were always kept separate. I never told either of them that I was building stills. The deal was that Coates and Malter were supposed to put in the money fifty-fifty, and out of the profits I was to get a third." (Tr., p. 90.)

Stumpf and Malter had bought tanks when they got Coates into the deal. Stumpf does not believe that he told Coates anything about the tanks. They were bought with five hundred dollars of Brix's money. Stumpf the Malter then represented to Coates that Malter was putting up five hundred dollars, and so Coates put up five hundred dollars. Stumpf kept Coates' five hundred dollars; gave Malter back his five hundred. The real money was put up by Coates.

"I did not keep Coates advised as to all that I was doing, some things, but not all. I never told Coates that Olson and myself were going to build this still. Cap Olson and I never built this still. We never agreed to build the still. I didn't tell Coates that Olie Olson was building a still for me. I didn't tell Coates who was building a still for me.

"We used some of Coates' money in building the still that Olie Olson was building for me and Brix and Malter. The deal between me and Brix and Malter was an entirely different deal from the deal between me and Coates and Malter but we did use some of Coates' money in the deal between Brix and Malter and myself. The deal dropped with Brix at that time. It dropped about 40 or 50 days when we first started. Brix had clear run out on me on this job before I called Coates in on this deal.

"I don't know whether the statement in the indictment that Coates paid \$500 in September is correct, or not. I don't remember the dates and if the \$500 was put up by Coates September 19, 1930." (Tr., pp. 92-93.)



The first material was put up for constructing a still between Brix, Malter and Stumpf the latter part of August or September. Stumpf bought the tanks with Brix's money. He bought five tanks with Brix's money of 7200 gallons each.

"You can use those tanks for anything, for water, or anything. They are the same identical tanks that you would see in any grape concentrate or in any grape juice business. \* \* \* I discussed with Mr. Malter and Mr. Coates the capacity of these tanks." (Tr., pp. 93-94.)

Stumpf got money from Coates by telling him that he had put up a deposit to buy a still in Los Angeles, but not telling him how much it cost; that he was going down to get the still. That was shortly after Coates put up \$500. Malter was present at the conversation. I told Hugo Malter the same thing. He knew it was a fake. He got more money out of Coates by telling him that he had to take a trip to San Diego. (Tr., p. 94.) Coates then bought a truck for hauling tanks, equipment and alcohol. (Tr., p. 95.) The truck was to be part of the Coates-Malter-Stumpf combination. (Tr., p. 96.)

"I told Mr. Coates that I had bought a water system; that I would have to have it for a still. I never sent anything out there that looked like a still. There was nothing of any still sent to that place, nothing at all." (Tr., p. 96.)

The things presumably, according to Stumpf, to be used as parts of a still, were taken from the Caruthers

place to the Foss Ranch and Coates was so informed by Stumpf in December. Malter and Stumpf took Coates up there, showed him the still which Coates had never seen from September up to December. (Tr., p. 97.) It had been down on the Malter place but witness had not shown it to Coates as he was afraid Coates would talk. (Tr., p. 98.)

Coates, having given Stumpf considerable money, asked for an accounting. Stumpf endeavored to enlighten him in that behalf. (Re. Tr., pp. 98-99-100.) He testified, "I did not tell Coates that any of these expenditures went into a still. Then there is \$1,250 for machinery." (Tr., p. 100.)

Malter and Stumpf took Coates out to see the still at the Foss Ranch but did not tell him that anybody else was interested in the still. At that time the still was not being operated. It had not been started. Coates was told that it would start in a few days, maybe tomorrow. Coates came up there with Olson and told Stumpf he was going to put a man in charge to run the place. Olson examined the mash and said that everything looked all right. (Tr., p. 103.) I took a sample of the alcohol that was run. I stood there and watched it. Jim Proctor and Slim Kenney and myself ran it. I don't remember whether Olie Olson was there, or not. I told Kenney and Proctor that Coates was one of the parties. Coates was not there when I told them. I did not tell Coates the sum but told him they worked so many days at so much a day. (Tr., pp. 103-104.)

"Q. What did Coates say about paying them?

"A. He would run the stuff first and then have

the money. We got a very little alcohol, a little bottle full, a mayonnaise bottle full. I brought it down to Coates. It was alcohol. Coates drank some of the pure alcohol."

The witness A. J. Olson, after testifying to his acquaintance with various of the defendants, said that he met Coates shortly before the case came up, having been introduced to him by Malter, and had not known him before.

"I never saw Mr. Coates after that until I went up to the still house and nobody was with him." (Tr., p. 108.)

"I know defendant Arkalian. I just met him the one time that he came to my house. Mr. Coates was with him. That was in February, 1931. They came together and I had a little conversation with them in the yard. Coates said, 'I thought I was the only one in this game.' I think that is what he said. Arkalian said that Stumpf was a rat, I believe." (Tr., p. 109.)

#### Cross-examination:

"Of course if you run a still you had to make your own mash before you made the alcohol. I ran my arm down into this stuff and the most you could make out of it in the light of your experience was a little syrup. Mash is only a name. This mash was all sugar and water." (Tr., pp. 109-110.)

E. Pusey Cain, called for the Government, testified that in October, 1930, he had gotten some tanks from

Malter. They were hauled up by a Japanese named Hatta; that he had had no conversation with Stumpf or Malter in regard to leasing his property for the use of a still. (Tr., p. 110.) And, on cross-examination, that at one time Malter brought Coates and Stumpf around; that they looked around the grape concentrate plant of the witness. He was introduced to Coates, showed him around the plant which he was actually constructing for grape concentrate; that these people had come over to buy a syrup plant which the witness was constructing the tanks for. There was a syrup plant there, the tanks used for receiving grapes and grape concentrate plant. He never heard any statement by Stumpf, Malter or Coates about Coates being interested in a still nor did any of them say anything about the manufacture of alcohol. He did hear them say something about being interested in the sale and distribution of grape syrup concentrate. (Tr., pp. 110-111-112.)

Wilbert G. Whitfield, Federal Prohibition Agent in Fresno, in 1930, testified that he was at the Foss Ranch; that he there saw tanks and vats. He took nothing from the vats, but took a sample, a half-gallon bottle of mash, from the gravity tanks that were at the still location in the barn. The sample he took back to the evidence room of his department, kept it until he gave it to Government Chemist Stribling. Of the sample, he said:

"This ferments after you get it and hold it. It was tested shortly after I got it in my possession.  
 \* \* \* When I got this sample from the tank



on the Foss Ranch the ranch was deserted, with the exception of some forest rangers.

"There was nothing on the ranch. I have no idea who put this liquid into that tank container that I took it from." (Tr., pp. 112-113.)

The bottle of mash was then offered in evidence by the Government. The offer was objected to as too remote, not connected with the defendants and not showing who put the mash into the tank receptacle. The objection was overruled and the same received as Government's Exhibit No. 6. (Tr., p. 113.)

### TESTIMONY OF WHITFIELD.

He (Whitfield) referred to a typewritten statement which he said was the result of an interview taken down in shorthand with Olson. The statement was offered in evidence. Objection of appellant Coates to its introduction was sustained in so far as Coates was concerned, the Court ruling that it was admissible against Olson, and the Government announced that it offered it only as to defendant Olson. (Tr., p. 141.)

The statement, which is in the form of question and answer, in so far as it relates to appellant Coates, is substantially as follows, and its introduction was protested as to Coates by the objection of the testimony which deprived Coates of an opportunity to cross-examine the witness. (Tr., p. 145.) The statement recited that Olson met Coates several times out at St. George Vineyard. He first saw him a long time after the witness started the still and that it was complete when Coates came out; that Stumpf and Malter had given

him the design; that Coates did not know anything about the still at all. He had a proposition, he wanted to build a still, too; a whiskey still. (Tr., p. 145.) He wanted to know what it would cost him. He never said anything more about it but that he wanted a still that would run out quite an amount. He didn't know anything about the still that I, Olson, was putting up. Malter, in the presence of Coates, said that Coates himself was going to put up the money for the still, but Coates didn't know anything about this one that I, Olson, was building. Stumpf was giving the directions as to this model and he was out there every day; took several months to complete the thing; it was carted up the hill in four sections; that he didn't see Coates while he was working on the still. (Tr., p. 149.)

Appellant Coates moved the Court to strike from the evidence all parts of the Olson statement referring to Coates, on the ground that such portions of the statement were irrelevant, incompetent and immaterial, not binding on Coates, made after the termination of any conspiracy which might have existed between Coates and others of the defendants, and on the ground that he, the said defendant Coates, had been deprived of an opportunity to cross-examine the said Olson as to such statements made by him. (Tr., pp. 151-152.) The Court denied the motion. (Tr., p. 153.)

Whitfield then said that of Government Exhibits 1, 2 and 3, the column and condenser he had first seen on a brush pile on the Malter ranch. On about the 22nd of April, after Hugo Malter had phoned him, he seized two 4000-gallon vats and eight 50-gallon vats and a

pump and a small boiler at the Foss Ranch. He made the discovery on April 5, 1931; that Hugo Malter pointed the place out where he discovered the articles. (Tr., p. 152.)

Fred D. Stribling, Government chemist, said that he had tested the contents of Exhibit 6, which had been given him by Agent Whitfield, and found it to contain mash containing 3.24 per cent alcohol by volume.

On cross-examination he said that he received the sample some time before the 17th of April, about a week; that Mr. Whitfield had told him that he had just received it. He made the test some time prior to the 17th of April; that such liquid changes from time to time, according to conditions, depending upon conditions and the amount of sugar, whether the alcoholic content were increased during a period of some months; that it was fairly warm in April; that that would have to do with the alcoholic content and he could not say what alcoholic content the specimen in question had in either January or February of 1931.

Whereupon defendant Coates moved the Court for an order striking from the record the testimony of the witness Stribling upon "the ground that the testimony was at variance with the allegations of the indictment, in that the charge against the defendant was conspiracy to possess and manufacture a still and not conspiracy to manufacture liquor, and that any evidence concerning the possession of liquor or manufacturing of liquor or alcohol was irrelevant and immaterial." The Court denied the motion and exception was noted. (Tr., pp. 113-114.)

E. L. Kenney, for the Government, testified that he had previously pleaded guilty in this case; that he knew Stumpf, Arkalian, and had seen Coates two or three times, that was all; that he knew who he was. He didn't know Brix; that he knew Olson. He had known Stumpf for four or five years and had been employed by him; that he knew Malter by sight; that about the 9th of December, 1930, Stumpf came out to see him and asked him if he would be interested in working at an alcohol still; that about a week later he met Stumpf in Fresno who said he was getting ready to start the proposition. The witness told him that he would go to work. The location of the still was not disclosed to the witness, who was to get ten dollars a day for work on the job and five dollars for every day he was in jail. (Tr., p. 122.) In about ten days he went up to the job to the Foss Ranch; when he got there, there was no equipment for a still. Jim Proctor was at the place. Stumpf returned and they started to work looking for water and a proper location, and decided to put the still in the barn. They repaired some barrels, filled them with water and put the mash into them. There was no still there at that time. Stumpf directed the mixing of the mash. Stumpf, Proctor and the witness prepared the mash. There was no sugar, so Stumpf gave the witness an automobile to haul up 47 sacks of sugar. (Tr., p. 123.) About a month after the witness went to work the distilling apparatus was hauled up to the Foss Ranch, "part by myself and part by Stumpf." Thereupon Government's Exhibits 1, 2 and 3, identified by the witness as parts of a still he had



seen on the Foss Ranch, were received in evidence. The defendant objected that no foundation had been laid; that there was no evidence to connect the defendants with the exhibits. Objection was overruled and exception noted.

He saw Coates at the Foss Ranch twice. He heard a conversation between him and Stumpf with reference to the payment of salaries of the witness and Proctor. This was along somewhere between the 9th and 10th of February. Stumpf wanted the witness to ask Coates for wages. The witness refused. Stumpf asked Coates about it and Coates said:

"I refuse to pay anything off. \* \* \* I put money into this deal and have never got any money back out of it. \* \* \* in fact, Mr. Stumpf, I gave you \$3,000. Mr. Malter gave you \$3,000, and I refuse to put any more money in the deal. In regard to paying these men off, the only way I know that they will get their money is to go ahead and run the stuff off and sell the stuff." (Tr., p. 125.)

The witness heard a conversation in which Stumpf said:

"'I am going to get out from this deal. They don't seem to be satisfied with what I am doing here. This is your new boss coming up. I am through. If you fellows want to work any more, you can go ahead and work. If you don't you can quit.'

"Stumpf said he would get some money. He went away and came back. He stalled. He was

evasive. He would say he would be back the next day or the second. He said he didn't get it at that time. On the last day that he was up he offered us \$30.30. He said:

" 'That is all the money I got.' We declined to take it. The still was built and we tore it down and rebuilt it. It was still up. When Coates and Olson came up the still had been tested and a run made on it, but we tried to run it and it wouldn't run. We made an effort to run it. We didn't get very much alcohol, about a gallon. That is the only time I knew of its ever having been steamed up while I was there. The matter with it was that the mash wasn't in shape to run, for one thing, and then it leaked, it leaked all over. \* \* \* Once when Arkalian and Kirkorian were there, they were at the house and another time they were there Stumpf sent me up to the mountains and told me to keep out of sight, to lay low, that he didn't want them to see me." (Tr., pp. 126-127.)

On cross-examination he testified that Stumpf said:

" 'Boys, this is your new boss. I am through.' I don't know whether he referred directly to Mr. Coates or Mr. Olson, but I believe it was Mr. Coates. Mr. Coates gave me no money at any time. I didn't demand any money from Coates."

The witness then tried to get his pay from Stumpf. Stumpf wanted him to ask Coates for the money. The witness told him that he didn't know whether Coates owed him any money. (Tr., p. 128.)

"Coates and Stumpf had an argument about pay-

ing off the men. Coates said, 'I am all through. You delusioned me on this deal up there. You told me that you paid \$1,200 for this still and paid \$200 to have it hauled up from Los Angeles. I have found out since that you made this still out at Malter's.' Stumpf told him (Coates) out there, 'If you don't pay these men they are going to bring suit against me and you know what that means.' (Tr., p. 129.)

"When I went back up there I told Proctor what I could find out, that Stumpf had got the money away from these fellows gypping them. I explained to him what Coates had said. At that time Stumpf admitted to Coates that Coates had given him \$3,000 and Hugo Malter had given him \$3,000, and he accused Stumpf of taking that money and furnishing the house and buying the place where he lives."

(It will appear from Malter's testimony, hereinafter referred to, at length, that Malter never paid any money into this venture; that he had delivered money to Stumpf and then received it back.)

The witness further testified that he had been convicted of a felony.

James Proctor, for the Government, testified that he knew Stumpf and Kenney, having met them in December; that he met Coates twice at the Foss Ranch; that Mr. Coates had been introduced under the name of Brown. Stumpf said he was going to put up a still and wanted the witness to work for him, and things were brought out and some materials were brought out. A

man named Olie Olson came to the Foss Ranch to work on the still. The still in question is the one in the courtroom. At the Foss Ranch he met Coates, Arkalian and Kirkorian. Coates came by himself. He had no conversation with him. Stumpf promised the witness eight dollars a day and board. Stumpf brought up groceries. Coates ate lunch at the ranch one afternoon and after he left, Stumpf wanted to dump out the mash and hide the still. (Tr., p. 132.)

On cross-examination the witness is asked:

“Did you ever hear any talk on the Foss Ranch in the presence of Mr. Coates or Mr. Olson where anything was mentioned about the operation of the still or of the engaging in the manufacturing or sale of alcohol? A. No.”

Walter G. Kerr, for the Government, testified that he knew Stumpf; had met Coates; knew Malter; didn't know Kirkorian. About September 9th Malter asked him if he would like to go to work. That afternoon he introduced him to Stumpf. He was to work for ten dollars a day and expenses as carpenter, repair work. Went to work on the 12th; that he went to work on the Malter place, where he saw Olie Olson working on some copper and what they claimed they were making a pot of. He saw Stumpf every day there. He never saw Coates down there. (Tr., pp. 135-136-137.)

On cross-examination he said that he had never heard anybody mention Coates' name; that he did lots of work for Malter and often heard him talk about being in the grape syrup business and that it was Stumpf who wanted



him to build a still, his business being that of a carpenter; that he quit because he got cold feet, also distrusted Stumpf, who never paid him but told him to go to hell when he asked him for his wages. (Tr., p. 137.)

G. H. Malter, a witness on behalf of the Government. The Court was informed that at the beginning of the trial an order had been made excluding all witnesses. Counsel informed the Court that the witness Malter had been furnished with the testimony as it was transcribed from day to day. Mr. McNabb, on the part of the Government, admitted that the witness had been furnished with a part of the transcript and had been interrogated on it, and that he had seen the witness reading the transcript, at least portions of it, which had been furnished to him by the Government; that the witness came in and wanted to see the transcript and we, the Government attorneys, let him look at it, and told him he could read it if he desired. (Tr., pp. 138-140.)

The Court ruled that the allowance of the testimony of the witness Malter was within the discretion of the Court; to which exception was taken. The testimony was admitted, whereupon the appellant Coates, through his counsel, then and there duly excepted to the ruling of the Court.

Thereupon the appellant Coates, through his counsel, upon motion, asked permission of the Court to examine the witness Malter as to the true facts surrounding the furnishing to him by the Government attorneys of the daily transcript. The motion was, by the Court, denied, to which the appellant Coates, through his counsel, then and there duly excepted.

Malter testified that he has lived in Fresno all his life and is acquainted with all the defendants in the case. He had never met Kirkorian, but he knew Brix about a year and a half in a social way prior to this transaction; that Brix called him up to go to his office and he there met Brix and Stumpf. This was early in August. Stumpf led the conversation, telling of his successful and unsuccessful experiences in the bootlegging racket, and there was some conversation as to the practicability of using syrup as a distilling material as a substitute for sugar. Something was said about whether syrup would be as well in making alcohol as sugar. Nothing definite was arrived it.

“One evening Brix brought Mr. Denning to my house and the conversation was on the practicability of selling port wine and brandy.”

He again went down to Brix's office, where he met Stumpf and Brix. Stumpf said they had two stills running and he was intending to start another one. He said the output of these other two stills was completely taken care of. He was trying to find a distributor for the third still. The conversation drifted around where Brix and the witness were to supply the money to get the still going and Denning was to take a quarter interest in the still for distribution. Stumpf was to be manager and furnish a truck.

“There was another meeting between Brix, Stumpf and myself. A day or two later Brix and I went to Cap Olson's. I introduced Cap to Brix. There were a lot of apricots there and the sugges-

tion was made as to what good apricot brandy they would make. Brix said something about a man who could make a still and Cap Olson said something about his brother.

"We met again at Brix's house. Nothing definite came out of that meeting. Stumpf, Brix and myself had another meeting in August. At this one, Cap Olson was present. We made an appointment to go to Cap Olson's at 2 o'clock. Brix arrived and left \$500. That was paid to me. Brix came in the house and only walked a few feet in. Stumpf, Olson and I sat and talked and I gave Olson \$100 out of the \$500 and gave Stumpf \$400.

"The next time I saw Olie Olson he had a lot of copper and a few tools. I gave him an old building to put them in. About this time Olie Olson began to manufacture an alcohol still. He got the various pieces together. Stumpf, Brix, Olson and myself were there and Brix said the soldering was terrible. Brix showed Olson how to do the soldering. After awhile the stuff was moved over to Cap Olson's place. Tanks were moved over to Olson's barn, where they remained a few days and they were then hauled to Cain's place, about ten miles distant, where they remained possibly a month. Then they were taken over to another place that Stumpf had on the west side. This was the Caruthers place. Then they were moved back to Cain's.

"When Denning returned to get the alcohol, Stumpf said it would be impossible to deliver it until later. I didn't put up any money. I was supposed to put up some syrup when they got the tank set and ready to put the syrup in. When Stumpf got to the Caruthers place they wanted to

import a laborer. I recommended Kerr. Coates recommended Andreas. Stumpf and Coates and myself went down near the Caruthers place at one time. We rode by the place a couple of times. We drove by the place and went in the place once. Coates and I saw some tanks and equipment and some men working. They were Kerr and Cannon, setting up tanks and cleaning the barn out.

"I have seen Government Exhibit No. 5 in my house in October. Coates, Stumpf and myself were present at that time. Coates wrote down some of the items, the expenses that had been put out. Stumpf gave him the items; that is, the card that Coates was writing on at the time. It was laying on the table and I accidentally found it five months later."

To the introduction of this card, Exhibit No. 5, appellant Coates objected on the ground of no proper foundation being laid; that it had not been properly identified. Objection was overruled. Appellant Coates then and there excepted to the ruling of the Court. (Tr., p. 163.)

"I talked with Stumpf and Coates in connection with the San Diego trip in Coates' automobile. Coates drove us out to look at the ranch. A lot of material was taken to the Caruthers ranch and remained there three weeks or a month; then it was taken back to the Cain place and partly to my place. Coates told me that Andreas had reported to him that somebody looked in and saw the tank and this work was going on inside the barn, and then Coates and I decided it would be a better idea to get out of



the place, it might be dangerous. We then moved the stuff away from the Caruthers ranch, taking part of it back to Cain's place and the rest of it to my place. The equipment was next taken to the El Sonora place. From the El Sonora place the equipment was taken to the Foss Ranch. Some time in December. I didn't help move it. I gave the parts to Stumpf. Stumpf told me that there had been produced in that still at the Foss Ranch about a gallon of alcohol. He brought a sample down to Fresno. Coates, myself and Stumpf were present. I tasted it. It was pretty strong. Coates seemed to like it. Coates said he wanted Stumpf to get some, to have drinking liquor. He said, 'Well, can't you get five gallons of this?'

"I have been engaged in the grape syrup business."

On cross-examination Malter testified that he had read excerpts out of several volumes of testimony, but no complete volume; that it was not necessary to get permits in order to engage in the business of manufacturing grape concentrate. (Tr., p. 167.)

"The grape concentrate deal was mentioned by Coates to me. I am in the grape concentrate business now, experimenting in grape juice concentrate. When I got interested in this enterprise with Ted Brix and Stumpf, I was interested in grape concentrates. My idea was to sell the grape concentrate that I had on hand to men who were in illegal, illicit business, and if they wanted to use it to make alcohol, it was all right with me. I didn't tell Nichols on October 5, 1931, at any place, that

the deal started out as a legitimate juice deal and later became a still racket.

"In this enterprise I didn't put up any money. I was to put up some syrup. That was my contribution. Stumpf's contribution was his great executive ability, or something, or technical knowledge. \* \* \* Tex Brix's contribution to the enterprise was money. When Brix got out of the picture and Coates came into it, Stumpf's contribution was to be executive ability and brains." (Tr., p. 169.)

"When I said Saturday that I was supposed to put up syrup, it was in reference to Brix. In all, I put up \$1,800. I didn't put up a cent of that while Brix was in the picture. When I talk of money put in by me I do not mean money contributed. Where I say I contributed \$1,800, I mean that I put up \$1,800 in cash into the hands of Stumpf. I actually gave him \$1,800 in cash. \* \* \* Stumpf hijacked or stole the still from the Foss Ranch.

"When I paid moneys amounting to \$1,800 to Stumpf, I knew he was a convict. I knew he was a bootlegger. I knew that Stumpf had lied to me. I knew that before I gave him this money. When this still was taken from the Foss Ranch by Stumpf it was placed in some bushes, but not on my property. I took Mr. Whitfield, the prohibition agent, to the place where they were hidden. I knew where they were hidden. The man who put them there told me they were there. His name is Cannon. He worked on my ranch. I said Stumpf was instrumental in having the still hijacked from the Foss Ranch. The still was put in the bushes on my

place and Mr. Whitfield picked it up half an hour after it was put there. \* \* \* I made the arrangements with Mr. Whitfield. (Tr., p. 170.)

"I have known the defendant Coates for many years. Our relations were always purely social.

"In the arrangements in the beginning with Brix, Stumpf, myself and Denning, Coates *was not in on that; had nothing to do with it. Coates had nothing to do with the arrangements until after Brix had gotten out.*"

At page 170 this question was asked the witness:

"Do you remember at that time telling Mr. Savage in his office about the 10th of February that you had Coates where he could not say a word because you had it in Coates' own handwriting where it showed what it cost to make alcohol and that he was engaged in the still business and that you had that memorandum and you were going to keep it?"

To which question the Government interposed the objection that it was irrelevant, immaterial, incompetent and not proper cross-examination. The Court sustained the objection and exception was noted.

Witness continues:

"I had a conversation at one time with Coates and the witness Morin at the Fresno Hotel. Coates had a room there and I was living there, too, at that time. \* \* \* There was no conversation of any serious character that could have been carried on. I left and came back later."

This question was asked of the witness:

“Now tell, relate what took place after you came back, what you saw and what happened.”

The question was objected to by defendant Coates on the ground that the same was irrelevant, incompetent and immaterial, which objection the Court overruled, and to which ruling the appellant Coates duly excepted.

“A. They were never capable of conversation. They were intoxicated.”

Whereupon the defendant Coates, through his counsel, asked that the answer of the witness be stricken out, and the motion was denied and the said defendant Coates again duly excepted to the ruling of the Court.

Witness continues:

“When I came back, they were both lying on the bed.”

Howard N. Foss testified on behalf of the Government that he sold to Mr. Stumpf 480 acres of land and identified the original agreement of sale. On cross-examination he testified that Stumpf told him when he entered into the agreement for the purchase that he was going to run a dude ranch with a fellow by the name of Malter. That he met Malter on the property.

“I never saw Coates up in the hills on the Foss Ranch. I never heard Coates' name mentioned in connection with this deal. Other than Malter, nobody was mentioned.” (Tr., pp. 172-173.)



On behalf of the defendants, E. A. Nichols was offered as a witness, who testified (Tr., p. 173) :

“\* \* \* Malter told me that he had told the United States authorities that when he met Stumpf and Brix on the first occasion all the conversation was about concentrates.

“Malter told me that the deal started out as legitimate juice deal and it became a still racket.”

That he had Brix quit.

W. D. Coates, Jr., a witness called on behalf of defendant Coates, testified :

“I have known Hugo Malter and had a conversation with him on the 26th of October at my house. I asked Malter what he was doing and he said that he and my son Lloyd were in the grape concentrate business and he absolutely assured me that he had, through the hard efforts of Henry Barbour, Congressman, acquired the proper legal permits to make grape concentrates, and I said to him, ‘Is it perfectly all right if you make grape concentrate and what do you do with them afterwards?’ And he answered, ‘It is just the same as a man who ships a carload of wine grapes from here. It is none of his affairs what is done with it after they reach their destination. As long as I am legally making these grape concentrates, I am not interested in what becomes of it.’ ”

Edna Pearl Coates, a witness on behalf of the defendant Coates, testified :

"I am the mother of Lloyd Coates. I heard Malter testify in court that he used an alibi on me. Used grape concentrate so as to put me off my guard. I never had a conversation with Malter in which grape concentrate was ever mentioned. I have never talked to Malter about grape concentrate."

On cross-examination she testified that during all of her conversations with her son he told her that Malter and he were in the grape concentrate business.

J. L. Broad (Tr., pp. 181-182) testified on behalf of defendants that he is a chief of police of Fresno; that he knows the general reputation of the witness Stumpf for honesty and integrity in this community and it is bad; that he would not believe him under oath.

On cross-examination he testified that Stumpf has been arrested a great number of times; he has been convicted of felony twice. Around Fresno it is a matter of common knowledge that he is a notorious criminal.

It was stipulated that the testimony of Doctor Ray would be as follows, he being ill and unable to testify:

That he saw Malter and Coates in October, 1930, and they said their money was tied up in a concentrate business and that as soon as they could get it out they would be interested in a stock deal.

W. G. Phillips (Tr., p. 183) testified on behalf of the defendant Coates that he met Hugo Malter and Coates, at Coates' house about the 15th of October. Coates and Malter had a proposition for the manufacture of grape syrup and Coates wanted to know if the

witness would be interested in such a proposition to the extent of \$3,000, the same portion being allotted to Coates and Malter.

Witness Francis Morin (Tr., p. 184) testified on behalf of Coates that he was in the oil business; that he met Malter and Coates on the 12th of December in the Hotel Fresno and that Malter told him that he and Coates were in the syrup business and desired to purchase tin cans, and Malter mentioned that in the syrup business it was necessary to have the cans lacquered on the inside.

### ARGUMENT.

As has been pointed out, it is very plain that the evidence received for the Government indicated the existence of at least two distinct conspiracies; that this appellant Coates was not common to them but was a member of only one, to-wit, of the Stumpf-Malter-Coates conspiracy, if any ever existed.

The Brix-Malter-Stumpf conspiracy and all of the transactions which occurred between and among those three persons were foreign to the Coates conspiracy. Coates had nothing to do with Brix. Coates did not know what was going on between and among Brix, Stumpf and Malter. Coates was not told that Brix had ever put any money into a still, particularly in a still at the Foss Ranch, if there were one there.

Notwithstanding the complete line of cleavage and that the Government witnesses classify the Brix transactions as wholly distinct from the Coates transactions,

all of the evidence introduced concerning the combination of Brix-Malter-Stumpf and its purpose is received and was doubtless weighed by the jury against Coates. It seems to us that it adversely affected Coates to a material degree. It is true that the evidence of these distinct transactions went in practically without opposition, but this Court has the power, notwithstanding exceptions were not saved, to consider the error in this behalf and to relieve the appellant therefrom.

“It is that in criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct in the interest of a just enforcement of the law serious errors in the trial of their cases fatal to the defendants’ rights, although these errors were not challenged or reserved by objections, exceptions or assignments of error.” *Lamento v. U. S.*, 4th Fed. 2nd, 901. Citing a great number of cases.

In the above case no exception to the charge was taken on points on which the reversal was granted.

The failure to except to a charge of the Court is akin to the failure to object and except to evidence. That appellant Coates was adversely affected by the testimony concerning the Brix combination seems by analogy to be the situation involved in *Terry v. United States*, 7 Fed. 2nd, p. 28. In that case it appeared that a number of persons, among them Terry, were charged by an indictment with having, near Allen’s Wharf in Monterey County, about November 1, 1921, conspired to commit offenses against the United States in violation of the Na-



tional Prohibition Act. Terry was found guilty. On the trial the court admitted evidence over objection and exception tending to prove that, six weeks prior to the incident at Allen's Wharf, Terry employed one Frohn to transport liquor from Bodega Bay to a ranch near Petaluma and that about the same time the defendant Zucker rented a barn in that vicinity and that nine barrels of liquor were stored in it.

"There was no testimony of any kind, direct or circumstantial, tending to connect any of the other defendants with this prior incident or transaction."

For the error in the admission of the Bodega Bay incident and the charge of the court pertinent to the same, the judgment was reversed and a new trial ordered. Since what occurred at Allen's Wharf has no relation to what occurred at Bodega Bay in point of common purpose of enterprise or of individuals involved, the Bodega Bay incident, involving as it did transportation of liquor, was held to have adversely affected the persons indicted for conspiracy at Monterey Bay.

The same reasoning would seem to apply here, assuming for argument's sake the truth of all the testimony of Stumpf and Malter. They were not only an unsavory pair, but were involved in unsavory business, and the jurors may very well have been induced to believe that Coates was guilty of a conspiracy to construct a still from the fact that two of Coates' associates had on other occasions, unknown to Coates, and for the purpose of accomplishing things that Coates could have had no in-

terest in, made efforts to construct a still or stills at different places and from money raised from different sources.

When we take from the sum total of evidence relied upon to connect Coates with either the crimes of conspiring to possess apparatus designed for the manufacture of liquor or with the possession of property and apparatus designed and intended by the defendants for the manufacture of liquor, all that evidence which concerns transactions foreign to himself, so little remains, if any, that we again urge that his conviction must have been induced by the evidence which we believe should have been excluded.

Stumpf and Malter had bought tanks before Coates came into any deal. Stumpf does not believe he told Coates anything about the tanks; they were bought with Brix's money.

The Brix deal had matured and Brix had withdrawn. The combination had ended before the Coates combination was begun. Malter and Stumpf avowedly had distinct objects when they dealt with Brix, Coates and Arkalian respectively. There was not one conspiracy; there were several. It seems to have been the view of the Court that even though there were distinct conspiracies, to one of which one group of defendant belonged and to another of which a distinct group belonged, that the evidence against one was admissible against the other, even though they were not working to a common but to distinct ends.

In the Terry case, *supra*, we find the following quotation from *United States v. McConnell*, 285 Fed. 164:

"If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were cooperating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

It was highly prejudicial to Coates to be called upon to defend himself against transactions foreign to himself, to combat conversations between and among members of a distinct combination, and he had no means of foreseeing that they would ever be urged against him, and when these conversations related to matters in themselves breaches of law, the onus of which was made to fall upon Coates, although there had never been any dealings between him and the actors concerned therein.

### **Count I of the Indictment is Insufficient**

Count 1 of the indictment charging a conspiracy under the provisions of Section 37 of the Penal Code of 1910, does not state facts sufficient to charge a public offense. The charging portion of the indictment is that the "said defendants did unlawfully and in violation of Sections 3 and 25, Title II of said Act, manufacture and possess apparatus intended and designed by said de-

pendants for the manufacture of intoxicating liquor, all of which should then and there be fit for beverage purposes and all of which should contain more than one-half of one per cent of alcohol by volume," etc.

Where the language of the statute is general in terms and does not specifically set out the elements constituting the offense, an indictment charging the offense in the generic terms of the statute is not sufficient.

*Pettibone v. U. S.*, 37 Law Ed. 419.

In *U. S. v. Robinson*, 266 Fed. 243, the court held:

"Again, if the conspiracy attempted to be charged in these cases is framed under the old conspiracy act (Section 37 of the Penal Code [Comp. St., Sec. 10201]), while it is requisite in such case to plead and prove the doing of one or more overt acts by one or many of the co-conspirators after the formation of the conspiracy and in furtherance of its unlawful purpose to make out a completed and punishable offense, yet such overt acts charged to have been done cannot be resorted to, to explain or aid in any manner in making out the criminal charge of conspiracy. This is a settled law. In *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, Mr. Justice Woods, delivering the opinion of the Court, says: 'The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiae, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that, in an indictment



for conspiracy under Section 5440, the conspiracy must be sufficiently charged and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg. v. King*, 7 Q. B. 782; *Commonwealth v. Shedd*, 7 Cush. 514.' In *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, Mr. Chief Justice Fuller, delivering the opinion for the Court, says: 'The conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.' In *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, Mr. Justice Brewer, delivering the opinion of the Court, says: 'If the conspiracy was entered into within the limits of the United States and the jurisdiction of the Court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.' See, also, *Bannon & Mulkey v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90; *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614."

In *Brenner v. United States*, 287 Fed. 636, the Court held:

"An indictment must charge an offense directly, and not inferentially or by recital, and all material facts and circumstances embraced in the definition of the offense must be stated in the indictment, and, if any essential element is omitted, such omission cannot be supplied by intendment or implication.

"An indictment for conspiracy to commit an offense against the United States Government, to-wit, to use non-beverage alcohol for beverage purposes in violation of Food Control Act, August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 3115<sup>1</sup>/<sub>8</sub>e et seq.), Tax Act October 3, 1917, and Act November 21, 1918, which charged as the overt act the 'purchase of five barrels of distilled spirits, to-wit, non-beverage alcohol,' stated no offense nothing in these acts prohibiting such use of non-beverage alcohol, and there being no allegation of facts disclosing the contemplated use to be unlawful.

"An indictment must so distinctly state the facts claimed to constitute the criminal breach as to advise accused of the charge to be met, and afford him fair opportunity to prepare his defense, and so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may determine whether the facts stated are sufficient to support conviction."

In *United States v. Dowling*, 278 Fed., at page 630, the Court held:

"Indictments under Criminal Code, Sec. 37 (Comp. St., Sec. 10201), charging conspiracy 'to commit an offense against the United States, that is to say, to violate Title 2 of the National Prohibition Act in this, to-wit, that the said (defendants) would then and there possess certain intoxicating liquors, to-wit (stating number of cases of liquor), contrary to the provisions of said act,' without stating the kind of liquor, or otherwise alleging which of the many provisions of the Prohibition Act defendants

conspired to violate, *held* insufficient as too general and not sufficiently informing defendants of the charge they were required to meet.

*"In an indictment for conspiracy, allegations of overt acts cannot be resorted to in aid of an insufficient averment of the offense which was the object of the alleged conspiracy."*

"An indictment for conspiracy to violate the National Prohibition Act by possessing 'certain intoxicating liquors (stating the number of cases), contrary to the provisions of said act,' without alleging any facts to show that such possession was unlawful, either on account of the time, place or purpose of the possession, or the character of the liquor *held* not to charge an offense."

In *Hilt v. United States*, 279 Fed. 421, the Court held:

"An indictment charging in one count that defendants conspired to violate Title 2 of the National Prohibition Act (41 Stat. 305) in that they 'would then and there possess certain intoxicating liquors (describing them), contrary to the provisions of said act', and in the second count that the same persons, at the same time and place, 'unlawfully and knowingly did possess certain intoxicating liquors' described, *held* insufficient to charge an offense in either count."

Though the transcript at bar does not disclose a demurrer or motion to quash for insufficiency of this indictment, it is, however, the law that failure to demur waives objections, except that some substantial element

of the crime was omitted from the indictment. In *Berry v. U. S.*, 259 Fed. 203, this rule is announced:

“Failure to demur to the indictment waives all objections thereto, except the objection that some substantial element of the crime was omitted therefrom.”

For aught that appears in the indictment under immediate criticism, that which the defendants conspired to possess might have been a stepladder or a piano, things clearly not designed for the manufacture of liquor. The pleader makes no effort to describe that which defendants possessed as designed to manufacture liquor, and hence there appears nothing but his conclusion that the things designed to manufacture liquor were adapted to that purpose. Under the cases above referred to, in order that an indictment state an offense, namely, conspiracy to manufacture and possess apparatus intended and designed by the defendants for the manufacture of intoxicating liquor, the indictment must show upon its face that the things which they conspired to possess could be used, that is to say, were designed and adapted for the accomplishment of the purpose. No resort may be had to overt acts pleaded to aid this deficiency and no reference may be made to the fourth count to aid the deficiency of the first count. The reading of the fourth count illustrates further the deficiency of the first count. In the fourth count, after charging these defendants with the possession of property and apparatus designed by them for the manufacture of liquor, the indictment goes further than the statement of the



conclusion and describes the apparatus so possessed, all of which are, or might, or could be component parts of a still.

Under the first count of this indictment, because of the substantial deficiencies no defendant could ever know what property the Government had in mind and intended to charge him with possession of as adapted to the manufacture of alcohol, but the Government would be at liberty to indict and reindict these defendants as often as it saw fit, each time intending to rely upon some other and different set of facts, appellant's or defendant's jeopardy never having been measured by descriptive matter of an earlier indictment.

**The rule requiring certainty, definiteness and precision in the indictment is just as applicable to an indictment charging conspiracy to commit an offense as it is to an indictment charging the actual commission of such offense.**

*U. S. v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

This was an indictment for conspiracy. It was held that all of the indictments were insufficient to state an offense, the court saying (p. 593):

"Every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law, or by statute, includes generic terms, it is not sufficient that the indictment shall state the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars \* \* \*

"The object of the indictment, is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail him of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

The substantial rights of the defendant Coates were invaded by the admission in evidence, through the testimony of a prohibition agent, of a confession or statement in the form of question and answer by codefendant Olson, made after the culmination of the conspiracy, if one ever existed. The evidence was hearsay; obviously defendant Coates had no opportunity to cross-examine Olson whose testimony in effect was in this manner laid before the jury. It is submitted that the error in its admission was not cured by the Court's instruction limiting the force of Olson's testimony to Olson himself.

In point is *People v. Gonzales*, 136 Cal., p. 666. Gonzales and Cota were jointly charged and tried for the murder of one Ruiz. The Court admitted in evidence, over the objection of Gonzales, declarations made by the defendant Cota to officers of the law after his arrest. These declarations had the force in incul-

pating Gonzales, Cota declaring that the responsibility in effect lay upon Gonzales. We quote:

“Remembering that it is not Cota who gives this testimony at the trial, but other witnesses who are testifying to what Cota has said, it amounts to charging and attempting to convict Gonzales upon the merest hearsay evidence. It is true that the judge properly instructed the jury that the declarations of one defendant could not be considered by the jury as evidence against the other. \* \* \* The Court reversed the conviction upon the ground that this testimony was hearsay and erroneously admitted even though no specific objection was made by Gonzales to the receipt of the testimony as hearsay.”

**The Court erred in receiving Government's Exhibit 6, which consisted of a glass container filled with a liquid said to have come from the gravity tanks at the Foss Ranch.**

While Government Agent Whitfield was under examination, there was introduced through him a half-gallon bottle of mash from the gravity tanks from the still location in the barn at the Foss Ranch. This defendant might have been charged in the indictment either with the possession of intoxicating liquor in violation of Section 3 of the National Prohibition Act, or with the possession of liquor designed for the manufacture of alcohol in violation of Section 25, and, of course, might have been indicted for conspiracy to violate Sections 3 and/or 25 in that behalf; but he is not charged with the possession of intoxicating liquor for any purpose, but merely in count one, with a conspiracy to manufacture and possess apparatus designed for the

manufacture of liquors, and, in count four, with having had the possession of property and apparatus intended for the manufacture of intoxicating liquor.

If we assume that the mash in question did contain 3.24 per cent alcohol by volume, we submit that the substantial rights of this appellant were invaded by the receipt in evidence over his objection of intoxicating liquor under an indictment which as to either count failed to charge unlawful possession of intoxicating liquor. Furthermore, that which the witness Whitfield introduced in evidence was taken from the Foss Ranch after the abandonment of this enterprise, after persons other than these defendants or any of them were upon the scene, with no preliminary proof that the same had ever been in the possession of any of these defendants. It is most respectfully submitted that the objection of remoteness of the sample and the failure to connect the same with any of the defendants or to show that it had ever been under the control of any of the defendants or that this defendant knew it was ever there, is good.

The ruling of the Court on the testimony of the witness Stribling is associated with the ruling complained of on the admission of the bottle of mash. Stribling, as a Government chemist, had received the sample from Whitfield, had tested it, found it to contain 3.24 per cent alcohol by volume. The objection was made that Stribling's testimony was in variance with the allegations of the indictment in that the defendant was charged not with a conspiracy to possess or manufacture liquor, but with a conspiracy to possess and manufacture a still, and that evidence of the possession of liquor was therefore



irrelevant. The Court denied the motion of appellant Coates to strike out the evidence of this witness.

The error thus complained of is linked with that committed during the course of the examination of the witness Whitfield in this, that it there appeared from the testimony of the Government chemist that at any time that the substance in question may have been in the possession of any defendant, assuming that, for argument's sake, at some time it may have been, he could not say that at said time it had any alcoholic content, for he made his examination shortly before April 17. He doesn't know what it would contain as to alcohol three months prior thereto.

It is submitted that the Court erred to the great prejudice of the defendant Coates in permitting evidence offered through the witness Malter that when he had visited Coates and one Morin in a room in a hotel he had had no conversation with them, because they were both drunk and in bed.

It is obvious that the effect of this evidence was prejudicial in the minds of a jury, particularly as it was gratuitously degrading. Had Coates made any statements which might be said to be germane in this case while under the influence of liquor, the weight of such statements might be judged in the light of the circumstances under which they were made, but as no evidence in the case was brought out as a result of the visit of Malter to Coates, allowing the witness to testify that Coates upon that occasion was intoxicated, is, we repeat, gratuitous degradation.

It is submitted that the Court committed prejudicial error in refusing to the defendant Coates the right to develop, through the cross-examination of the witness Malter, the motives which impelled him to come forward and testify and at the same time to develop his bias, prejudice and interest in the case.

The witness was asked this question:

“Do you remember at that time telling Mr. Savage in his office about the 10th of February that you had Coates where he could not say a word because you had it in Coates’ own handwriting where it showed what it cost to make alcohol, and that he was engaged in the still business and that you had that memorandum and you were going to keep it?”

The Government’s objection to this question as irrelevant and not proper cross-examination was sustained.

It is respectfully submitted that no citation of authority is necessary to establish that elemental proposition of law that any interest on the part of a witness adverse to a defendant on trial or the motives which may induce him to come forward and testify may always be developed upon cross-examination.

We have assigned as error the refusal of the trial court to exclude the testimony of the witness Malter on the ground that he had been permitted to read the daily transcript of the testimony after the Court had made its order at the beginning of the trial excluding all witnesses. The effect of such ruling permitted the circumvention of the Court’s order excluding witnesses from

the room and enabled Malter, a witness whose interest and prejudice is obvious from his testimony, to keep abreast of the Government's case, to the end that no matters or facts which he, the witness, deemed material against Coates might be given in evidence against him. This is not a case in which a witness, inadvertently stepping into a courtroom, has apprized himself of the nature of the evidence then being given, but a situation wherein a hostile witness, with Government approval and aid, has deliberately been enabled to amplify his testimony, adverse to a defendant.

It is respectfully submitted that for the reasons hereinabove set forth the Court erred in denying the motion for directed verdict and in denying a motion for new trial, and that the judgment should be reversed and the cause remanded.

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HARRY GOTTESFELD,  
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Attorneys for Appellant Coates.

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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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United States of America,  
*Plaintiff,*

*vs.*

Alexander Stumpf, J. L. Coates, Olie  
Olson, Theodore Brix, Zone Kirko-  
rian, D. Arkalian, James Proctor and  
Eugene L. Kenney,  
*Defendants.*

J. L. Coates,  
*Appellant,*

*vs.*

United States of America,  
*Appellee.*

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GOVERNMENT'S BRIEF IN ANSWER TO  
OPENING BRIEF OF APPELLANT COATES.

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**FILED**

**MAY 2 - 1932**

**PAUL P. O'BRIEN,**





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No. 6792

IN THE

United States  
**Circuit Court of Appeals,**  
FOR THE NINTH CIRCUIT.

---

United States of America,  
*Plaintiff,*

*vs.*

Alexander Stumpf, J. L. Coates, Olie  
Olson, Theodore Brix, Zone Kirkor-  
rian, D. Arkalian, James Proctor and  
Eugene L. Kenney,  
*Defendants.*

J. L. Coates,  
*Appellant,*

*vs.*

United States of America,  
*Appellee.*

**GOVERNMENT'S BRIEF IN ANSWER TO  
OPENING BRIEF OF APPELLANT COATES.**

There are four counts in the indictment, the first of which charges this appellant and seven others with conspiracy to violate sections 3 and 25, title II, of the National Prohibition Act, viz: to manufacture and possess apparatus intended and designed for the unlawful manufacture of intoxicating liquor for beverage purposes, to contain more than one-half of one per cent of alcohol

by volume, without having or intending to have a permit from any proper federal authorities. The period covered by the conspiracy is alleged to be between September 1, 1930, and April 21, 1931.

The second count charges the defendants with having in their possession and custody and under their control near Fresno, California, one still and distilling apparatus set up on the Foss ranch without having or intending to have a permit from the proper federal authorities.

The third count charges the defendants with carrying on the business of distillers on said Foss ranch without having given bond, with intent to defraud the United States of a tax on spirits distilled by them.

The fourth count charges the defendants with having, on or about February 1, 1931, at the same place, possession of property and apparatus designed and intended for the manufacture of intoxicating liquor for beverage purposes containing alcohol in excess of one-half of one per cent by volume, in violation of section 25, title II, of the National Prohibition Act.

Appellant Coates was convicted on the first and fourth counts and was sentenced to serve one year and one day at McNeil Island and to pay a fine of \$1,000 on the first count, and to pay a fine of \$100 on the fourth count. From this judgment he appeals.

With his petition for appeal appellant filed, under Rule 11 of this court, thirty assignments of error. His brief, however, contains but twelve. In his argument appellant does not deal separately with each of the twelve assignments and, in view of the method of presentation of appellant's argument, we will endeavor to follow as nearly as possible the course outlined by him.

## FACTS.

Under the above heading appellant has undertaken to review and criticize part of the evidence, and we deem it advisable, in order to fully present this appeal, to review and enlarge upon the facts as therein outlined.

It is contended that appellant's conviction was brought about principally through the testimony of Stumpf, who had previously pleaded guilty to the first and fourth counts. Stumpf had been convicted of a felony once before, not twice, as stated by appellant, as his plea in this case was his second conviction [Tr. p. 55].

Stumpf was not the only witness for the Government who gave testimony against Coates, and we think a careful perusal of the transcript will show that, while the testimony of Government's witness G. H. Malter did not agree in many details with that of Stumpf, his testimony, together with the testimony of "Cap" A. J. Olson, Proctor and Kenney, would have sufficed to convict Coates without any testimony from Stumpf.

In this connection we respectfully direct the attention of the court to the testimony of A. J. Olson, "Cap" Olson, a brother of defendant Olie Olson. He testified that he was introduced to Coates by Malter on his place, that he did not see Coates after that until he went up with him to the still, that on the road going up to the still Coates told Olson that he was going to show the still to him and see if he got "gypped" on it. When they got to the still they met Stumpf, who took Coates and Olson in the barn and showed them the "whole apparatus, tanks, still, the boiler and mash" [Tr. 107-108]. He further testified that the still was on the Foss ranch,



that he saw about 2,000 gallons of mash, which he tested, that Stumpf told him that it hadn't been working good, because it was too cold, that Coates was there when this statement was made and asked Olson, "Can you make anything out of that?" Furthermore, he testified that Coates asked him if he thought that still came from Los Angeles, and Coates further stated to Olson that Stumpf had told him he got the still in Los Angeles and had paid \$2,000 for it [Tr. 108].

Ferdinand Andreas testified that he had worked for Coates at a filling station and that in September Coates put him "on a different job" from that which he had previously occupied, raising his salary from \$90 a month to \$5 a day. His work under the increased salary was to drive a truck, that a Chevrolet truck was purchased in the name of Andreas and the next day Coates, Malter and Stumpf came out and gave him a receipt for \$100, representing the first payment on the truck; that Coates told Andreas to take orders from Malter and Stumpf. Andreas used the truck for hauling pipe, brick, posts, timber, lumber and barrel staves to Cane's ranch. He further testified that later on he was sent out to Caruther's place and that there were a couple of men there by the names of Cannon and Kerr when he arrived; that he hauled some nails, hammers, and black paper out to Caruther's ranch and worked with the other men cleaning out the barn; that during that period some men came and looked in the barn; that after that Andreas reported this fact to Coates, and right after that Coates told him, Andreas, to go home; that that night, about 12 o'clock, Coates and Malter came to where Andreas was sleeping and woke him and told him to move the stuff back in

the Malter garage. After that Andreas told Coates that he did not like the job and Coates transferred him to Salinas, where he had a service station, and reduced his wages to \$100 per month. Before Andreas left he signed over the truck to Coates; that Coates would not give him his pay check until he had signed an affidavit "in full power of the lawyer to go and get the pink slip for the truck" [Tr. 116-118].

W. G. Walsh, a Government witness, engaged in the truck business at Fresno, testified that he sold this truck to Andreas and that Coates and Andreas contracted for the truck and the contract was made in the name of Andreas [Tr. 120].

Defendant E. L. Kenney, who pleaded guilty to all counts, testified that he saw Coates on the Foss ranch twice and heard a conversation between Coates and Stumpf with reference to paying the salaries of himself and defendant Proctor some time between February 9 and 12. He stated that Coates said, "I refuse to pay anything off. I put money in this deal and have never got any money back out of it." That Coates said to Stumpf, "I gave you \$3,000, Mr. Malter gave you \$3,000 and I refuse to put any more money in the deal. In regard to paying these men off, the only way I know that they will get their money is to go ahead and run the stuff off and sell the stuff" [Tr. 125].

Kenney also testified that Stumpf introduced Coates to him under the name of Brown at the Foss ranch and that he saw Coates there with Cap. Olson about February 10th or 11th; that Olson and Coates went in the barn. At that time Stumpf said, "I am going to get out from

this deal, and this is your new boss," referring to Coates. Kenney had become insistent upon collecting the money due him for labor and Stumpf offered him \$30.30, which was declined. The still had been built, but had not proved satisfactory, but it was still up and when Coates and Olson came up the still had been tested and the run made on it. About one gallon of alcohol had been distilled, and Kenney testified that the trouble was that the mash was not in shape to run and the still leaked. The still was torn down and a new condenser made. "We all helped to make it. Olson was the mechanic" [Tr. 127]. That Coates, the last time he was at the still, ate at the house; that Olson worked on the still about five or six weeks, and during the progress of this work Kenney saw appellant Arkalian there; that he came with the defendant Kirkorian. Kenney also testified that of the alcohol manufactured Stumpf took a sample and left the remainder [Tr. 127]. In this connection Stumpf testified that he took the alcohol to Coates at the service station in Fresno and that Coates took several drinks of it and asked Stumpf if he couldn't get a gallon [Tr. 166].

Defendant Proctor, who had been dismissed out of the case on the motion of the Government, testified that he saw Coates, Arkalian and Kirkorian at the Foss ranch; that Coates came along the first time and that Stumpf introduced Coates to Proctor under the name of Mr. Brown; that Coates ate lunch there once when Cap Olson was with him and that they went into the barn, where the still was [Tr. 131-132].

Malter testified that he went with Stumpf and Coates to the Caruther's ranch, ten miles west of Fresno, in October; that Coates recommended Andreas to run the

truck; that Stumpf, Coates and Malter, while out riding at one time, went by the Caruther's ranch and on another occasion went in [Tr. 162]. Coates was with him that time. They saw tanks, equipment, etc., and saw Kerr and Cannon working there setting up tanks and cleaning out the barn; that at Malter's house Coates wrote down items of expenditure on a yellow card, which was introduced as Government's Exhibit No. 5 [Tr. 162]. This was in October. He talked with Stumpf and Coates about the San Diego trip, and Stumpf said he wanted to get a location for a still out near Clovis and had Coates drive him out there, but that the owner lived in San Diego, and it would be necessary for Stumpf to go down there and see him [Tr. 163]. Malter further testified that Coates had reported to him that Andreas had told Coates about some men looking in the barn at Caruther's ranch and "then Coates and I decided it would be a better idea to get out of the place, it might be dangerous" [Tr. 164] and that he and Coates went and told Andreas to move part of the tanks and paraphernalia to Cain's place and the balance to Malter's place [Tr. 164]; that the equipment, etc., was next taken to the El Senora place, concerning which Stumpf had told Malter that he, Stumpf, had rented, and that from there it was taken to the Foss ranch, which Stumpf had told Malter he had obtained from Mr. Foss.

Malter also identified Exhibits 1, 2 and 3, being different parts of the still, as the things that had been moved to the Foss ranch. Malter further testified that Stumpf had some alcohol which Stumpf stated in the presence of Coates and himself had been produced in the still at the Foss ranch; that Coates took two or three drinks of



this alcohol and said it was pretty good [Tr. 165], and Coates asked Stumpf if he could get five gallons of it [Tr. 166].

Howard N. Foss, a Government witness, testified that Stumpf bought the Foss ranch from him and at the time he was carrying on these negotiations Stumpf had told him that he was going to fix it up for a dude ranch [Tr. 172].

There was other testimony connecting Coates with the enterprise, but that already referred to will suffice to show that Coates was connected with the scheme from the time that Andreas was hired to drive the truck when he and Malter were fixing up the place at Caruther's ranch and from then on, covering the period when the tanks and paraphernalia were taken to the Cain and Malter ranches and from there to the Foss ranch.

### **There Were Not Two Distinct Conspiracies.**

On page 6 of his brief appellant contends that there were two distinct conspiracies, viz: the Stumpf, Brix, Malter combination, and the Stumpf, Malter, Coates combination, the first being to defraud Brix of money and the latter to defraud Coates. The evidence does not support this claim, for Malter testified that he put in his money to the extent of \$1800 in cash [Tr. 169].

It is immaterial, however, who put up the money for the enterprise or whether or not Stumpf and Malter conspired to deceive Coates or Brix by obtaining more money from them than they intended to expend. This was not the issue before the jury. Regardless of that fact, however, the evidence shows that Stumpf expended

much money for the furtherance of the enterprise and, besides that, he was entitled to deduct his salary of \$10.00 a day while Brix was in the deal. It appears that Stumpf must have expended a good portion of the money he received, including the money that Malter claims to have paid him.

Stumpf testified that some of Coates' money was used in the Brix deal [Tr. 93]. True, Stumpf testified that "the deal between me and Brix and Malter was entirely a different deal from the deal between me and Coates and Malter, but we did use some of Coates' money in the deal between Brix and Malter and myself. The deal dropped with Brix at that time. It dropped about 40 or 50 days when we first started. Brix had clear run out on me before I called Coates in on this deal." But Coates was contributing for the purpose of building a still very early in the enterprise, beginning at the time operations were being carried on at the Caruther's ranch [Tr. 162-163]. The conspiracy charged is that of manufacturing and possessing apparatus intended and designed for the illicit production of intoxicating liquor without having a permit so to do. Both Coates and Brix contributed towards the construction of the same still. The time or manner in which the capital was obtained is immaterial. They were all working to the same end and engaged in the same enterprise.

The evidence shows that Malter first contacted Coates after the money put up by Brix and Malter had been spent, and that after Coates had put up the first \$500 Stumpf went to San Diego to get a location. The mere fact that different persons may have entered the enterprise at its different stages of development does not change

in any way the nature of the scheme or conspiracy. Any person knowingly entering into an unlawful scheme or conspiracy is bound by everything that was done before his entrance therein and thereafter as long as he continues to participate in the enterprise.

Appellant's argument leads to the absurd conclusion that every time a new participant enters into a conspiracy such entrance terminates the conspiracy then under way and creates a new one. Such doctrine has no support in law and we do not believe that any decision of any court can be found to support it.

### **Testimony of Whitfield.**

On page 12 of his brief appellant deals with the testimony of Mr. Whitfield, a federal prohibition officer, who testified for the Government. A statement or confession signed by the defendant Olson was introduced through Whitfield. This was objected to by Coates, but the court ruled that it was admissible only as against Olson. The Government announced at the time this statement was offered that it was offered only as to defendant Olson and the court repeatedly instructed the jury that it must be limited to Olson alone [Tr. 141-143]. Olson is not appealing, and no error was committed.

*Hagen v. U. S.*, 268 Fed. 344 (9th Cir.).

On page 13 of his brief, however, appellant states that the court denied his motion "to strike from the evidence all parts of the Olson statement referring to Coates." The motion was not that the statement be limited to Olson, which the court had already done and had so instructed the jury, but was to strike from the evidence all parts

of the statement made by Olson and referring to Coates. If this motion had been granted as made, the court would have taken the entire statement out of the case *for all purposes and as to all defendants, including Olson himself*. Obviously this would have been error, as the jury was entitled to consider *all* of Olson's statement as against himself. The court, however, was very careful to admit it for the limited purpose above stated [Tr. 142-143].

Furthermore, the motion referred to on page 13 of appellant's brief did not relate to the Olson statement, but referred only to an objection to a question asked by Mr. McNabb as follows:

“Did not Mr. Brix offer to plead guilty?” [Tr. 152].

After such objection was made the court said:

“This is something happening after the indictment, of course, and after the conspiracy had terminated, and is, therefore, only admissible against the one making the statement. That is the rule. The jury no doubt understands that, because I stated it very plainly yesterday.”

Then, too, Brix is the only one who could now urge this objection. He was acquitted. The court limited the question to Brix and, in addition to all this, Whitfield specifically stated that “Mr. Brix did not offer to plead guilty himself. \* \* \* Mr. Fenston (attorney for Brix) said that he was willing to enter a plea of guilty to any misdemeanor charge, but he did not like to see the boy do a jail sentence for a conspiracy.”



If any further reason why the objection was not well taken is necessary we further urge that such objection and ruling of the court is not included in the assignment of errors set out in appellant's brief, although it was included among the 30 specifications filed on the appeal [Appellant's Brief, pp. 3-5; Tr. 208, Assignment No. 18].

On page 14 of his brief appellant discusses assignment of error Nos. V and VI, which involve objection to and a motion to strike from the record the testimony of Fred D. Stribling, Government chemist, to the effect that he had tested Exhibit No. 6, which is a sample of liquid taken by Mr. Whitfield and found to contain 3.24 per cent alcohol by volume. This sample was a part of one-half a gallon bottle of mash taken from the gravity tanks that were found at the still location in the barn at the Foss ranch. It was tested by Mr. Stribling within a few days after Whitfield obtained it.

The grounds upon which the motion to strike the testimony of Stribling were that the charge in the indictment was conspiracy to possess and manufacture a still and not to manufacture liquor, and that the evidence was therefore irrelevant and immaterial [Tr. 113-114].

The objection of appellant was not well taken, for the reason that the liquor was found at the location of the still and consisted of mash, which evidently was intended to be used for the purpose of manufacturing intoxicating liquor illicitly.

The indictment charges that the conspiracy was to violate sections 3 and 25, title II, of the prohibition law. Section 3 prohibits the manufacture, selling, transportation, delivery, furnishing or possession of such liquor,

and section 25 makes it unlawful to have or possess any liquor or property designed for the purpose of manufacturing intoxicating liquor. This mash was intended for the manufacture, which, necessarily, would involve the possession, to say the least, of such intoxicating liquor. The presence of this mash at the place where it was found clearly was relevant and material and strongly tended to establish the purpose for which the still, vats, etc., were to be used.

There is no doubt but what this sample was taken some time after the enterprise had ended, but this fact goes only to the weight of the evidence and not to its relevancy or materiality.

On page 18 of his brief appellant states erroneously that, from Malter's testimony, he never paid any money into this venture, and that Stumpf returned to Malter what money he put up. Malter, however, testified to the contrary, claiming that he put in \$1800 [Tr. 169].

### **Malter Was Not Disqualified as a Witness.**

On page 20 of his brief appellant urges error in the ruling of the court in permitting the witness Malter to testify, claiming that he was disqualified and incompetent as a witness because he had perused portions of the transcript, although the court had entered an order excluding all witnesses from the courtroom. The question is raised by assignment of error No. VIII, page 4 of his brief [Tr. 138-140; 153-156].

From the statements of counsel, which must be accepted as true, as they were not challenged, it appears that Malter had access to fragments of the reporter's record

of the testimony, consisting of a very small part of the entire record, but that he had never seen the entire transcript of the testimony of any one witness in the case [Tr. 156].

The court ruled that the admission of Malter's testimony was within the discretion of the court [Tr. 153-154]. Thereupon Mr. Curran, attorney for Brix, requested that "we", evidently meaning all of the defendants, "be permitted to show at this time, through the testimony of witness Malter, exactly what the circumstances were surrounding the reading of these transcripts."

The court, in response to Mr. Curran's request, stated that he might do so by cross-examination of Malter [Tr. 154]. Later on, upon the cross-examination, Malter stated he had read excerpts out of several volumes, but no complete volume; that Mr. Davis, of counsel for the Government, directed his attention to one or two excerpts and that he possibly read 30 or 40 pages, but didn't think it was that much [Tr. 167].

Counsel for Coates also cross-examined Malter and during the course of such cross-examination interrogated him concerning his reading of the testimony [Tr. 170].

The order of sequestration of witnesses did not, in terms, prohibit the witnesses from talking to counsel representing the respective sides, or in terms prohibit counsel from calling attention of witnesses to the testimony given by other witnesses. It is fair to presume, however, that such was the intent and spirit of the order, and we will present the matter on that assumption.

The undisputed testimony shows that Malter read but a very small portion of the transcript of the testimony

given by Stumpf. The only possible harm that could result from such conduct on the part of Malter would be in the repeating of the testimony given by Stumpf. In this connection, it will be observed that these two witnesses positively contradicted each other in their testimony on several points. It is obvious, therefore, that no harm actually resulted to the prejudice of the appellant. Error without prejudice is no ground for reversal. It is impossible, after reading the testimony of both these witnesses, to see wherein Malter patterned, or in any way shaded, his testimony to conform to that of Stumpf.

The matter of sequestration of witnesses is entirely within the discretion of the trial court, and a witness who disobeys the order of the court in this respect may be punished for contempt, but such disobedience does not disqualify the offender in any way from testifying.

“The right of excluding witnesses for disobedience to such an order, though well established, is rarely exercised in America; but the witness is punishable for contempt.” (1 Greenleaf on Ev. (16th Ed.), sec. 432c.)

The Supreme Court of Georgia, in the case of *Lassiter v. Georgia*, 67 Ga. 739, held that the trial court committed error in refusing to allow a witness for appellants to testify, on the ground that such witness was present in court in violation of the order of the court excluding the witnesses during the trial, unless appellants were in complicity with the witness, although the witness might have been punished for contempt in disobeying the order. This court further held that an innocent party should not be deprived of the evidence on that ground, but refused to reverse the lower court, because the appellants



were not injured by such erroneous ruling of the trial court.

The jury were fully advised as to the extent to which Malter examined the transcript of Stumpf's testimony. They were the sole judges of his credibility and the weight of his testimony and must have taken Malter's conduct into consideration in determining the weight and credibility to be given thereto.

Error without prejudice to the rights of the accused will be disregarded.

Sec. 269, *Judicial Code*;

Title 28, sec. 391, *U. S. C. A.*;

*Green v. U. S.*, 19 Fed. (2d) 850;

*Horning v. Dist. of Col.*, 254 U. S. 135, 65 L. Ed. 185.

In the case of *Wilson v. State*, 52 Ala. 299, the Supreme Court of Alabama said:

"If the rule is made, and a witness remains in court in violation of it, intentionally or by mistake, it is discretionary with the court to permit or refuse his examination, *and the exercise of the discretion is not revisable*. (Greenleaf on Ev. (16th Ed.), sec. 432; *State v. Brookshire*, 2 Ala. 303.)"

It appears that the courts are not in entire accord on every phase of the question presented, but from our analysis of the cases we believe the courts agree that it is entirely within the discretion of the court to permit or reject the testimony of a witness who has intentionally, or by the wilful complicity of those representing the side calling such witness, violated the order of sequestration, and that the ruling of the trial court is not subject to review; that where it appears that no harm or prejudice

resulted from such disobedience on the part of the witness, his testimony will be permitted, and that any witness intentionally violating the order of the court in this connection is subject to punishment for contempt.

*Holder v. U. S.*, 150 U. S. 91, 37 L. Ed. 1010;

1 *Greenleaf on Ev.* (16th Ed.), sec. 432;

*Hubbard v. Hubbard*, 7 Ore. 42;

*Bulliner v. People*, 95 Ill. 394;

*State v. Ward*, 61 Vt. 153;

*Wilson v. State*, *supra*;

*Lassiter v. Georgia*, *supra*;

3 *Wigmore on Evidence* (2nd Ed.), sec. 1837,  
pp. 901-919.

We find nothing showing any reversal or modification of the decision of the Supreme Court of the United States in the case of *Holder v. U. S.*, *supra*, in *Shepard's Citator*, or elsewhere. In that case the court lays down the rule that, if a witness disobeys the order, he may be punished for contempt and his testimony is open to comment to the jury because of his misconduct, but that he is not thereby disqualified and that the weight of authority is that he cannot be excluded on that ground merely, although under particular circumstances it is within the sound discretion of the trial court to exclude his testimony.

### **No Error in Admitting Exhibit No. 5.**

On page 23 of his brief appellant asserts error because of the introduction over his objection of Government Exhibit 5, which is a memorandum on a yellow card upon which Malter testified Coates wrote down notes of the cost of various items of materials purchased for the

enterprise. The objection was on the ground that it was irrelevant, incompetent and immaterial and no proper foundation had been laid.

In this connection Malter testified that Coates wrote down the items on the card and that Stumpf had given him these items some time in October while the three of them were at Malter's house and that this card had been under his control or in his possession; that "it was left on the table, and I accidentally picked it up in a corner some four or five months later. That is the card that Coates was writing on at the time" [Tr. 162]. The materiality is evident and the foundation ample. The court properly admitted this exhibit.

There is no assignment of error, however, in appellant's brief covering this alleged error, although it was specified as assignment No. VII in the assignment of errors filed with the appeal [Tr. 202].

Rule 24 of this court requires that appellant's brief shall contain a specification of errors relied upon, in which shall be set out separately and particularly each error asserted and intended to be urged. This has not been done and this alleged error should not be considered by the court on this appeal unless it shall appear to the court that it is a plain error, within the purview of Rule 11.

Appellant quotes, on pages 24-30 of his brief, from the testimony of several other witnesses, showing where objections and exceptions were made to certain rulings of the court, but we find none of these covered by either his assignment of errors in his brief or those filed upon the appeal, as shown in transcript, pages 201-212. We will, therefore, omit special reference thereto.

## ARGUMENT.

On page 30 of his brief appellant argues that the evidence shows the existence of two separate and distinct conspiracies and that appellant was a member of only one of these, the Stumpf-Malter-Coates conspiracy, if any existed; that Coates had nothing to do with the first conspiracy, did not know anything about it, and that he was not told that Brix had put up any money on the still.

All these persons were engaged in a common unlawful purpose, and all who, in any manner, contributed towards the furtherance of this unlawful purpose, or to the continuing of the unlawful conspiracy, which was initiated by Stumpf, Malter and Brix, even though they were not the original parties thereto, are equally culpable with the originators of the scheme.

*Van Riper v. U. S.*, 13 Fed. (2d) 961;

*Samara v. U. S.*, 263 Fed. 12;

*Burkhardt v. U. S.*, 13 Fed. (2d) 841;

*U. S. v. Olmstead*, 5 Fed. (2d) 712;

*Simpson v. U. S.*, 11 Fed. (2d) 591.

The conspirators need not be acquainted with each other.

*Allen v. U. S.*, 4 Fed. (2d) 688;

*Rudner v. U. S.*, 281 Fed. 516.

It is immaterial what time one may join the confederacy.

*U. S. v. Schenck*, 253 Fed. 212, affirmed, 249 U. S. 47, 63 L. Ed. 470;

*Nyquist v. U. S.*, 2 Fed. (2nd) 504;

*Thomas v. U. S.*, 156 Fed. 897.



Erection of a still or manufacturing or keeping of liquor for sale, pursuant to agreement, renders all participating guilty of conspiracy.

*Liberato v. U. S.*, 13 Fed. (2d) 564 (9th Cir.).

Joinder of a defendant in a conspiracy relates back to the date of its formation.

*Norton v. U. S.*, 295 Fed. 136;

*Jezewski v. U. S.*, 13 Fed. (2d) 599 (6th Cir.).

Two or more persons may initiate or promote a conspiracy to violate the law, but after they have done this anybody who comes in afterwards and takes part in it thereby becomes guilty as a conspirator from the time of its beginning.

*Hunter v. U. S.*, 267 U. S. 597, 69 L. Ed. 806;

*Mullen v. U. S.*, 267 U. S. 598, 69 L. Ed. 806;

*Shea v. U. S.*, 251 Fed. 433 (6th Cir.);

*Johnson v. U. S.*, 268 U. S. 689;

*Calcutt v. Gerig*, 271 Fed. 220;

*Allen v. U. S.*, 4 Fed. (2d) 688;

*Lew Moy v. U. S.*, 237 Fed. 50 (8th Cir.);

*U. S. v. Cassidy*, 67 Fed. 698;

*Burkhardt v. U. S.*, 13 Fed. (2d) 841;

*Liberato v. U. S.*, 13 Fed. (2d) 564 (9th Cir.).

They need not know the entire scope of conspiracy or identity of its members.

*U. S. v. Wilson*, 23 Fed. (2d) 112. *Certiorari* denied.

To withdraw from a conspiracy requires some affirmative action on the part of the one desiring to sever connections therewith.

*Hyde v. U. S.*, 225 U. S. 347, 56 L. Ed. 1114;

*Miller v. U. S.*, 277 Fed. 721.

None of the accused did this. Mere discontinuance of financial contributions to it is not a withdrawal.

The identity of the conspiracy is not destroyed by the subsequent connection of new parties therewith.

*U. S. v. Nunnemacher*, Fed. Cas. No. 15902;

*Hagen v. U. S.*, 268 Fed. 344 (9th Cir.) *Cert.* denied;

*Norton v. U. S.*, 295 Fed. 136.

On page 6 of his brief, however, appellant states that according to the testimony of Stumpf, he had engaged in two other distinct conspiracies or combinations; combination number one being to defraud Brix of money, and combination number two being to defraud Coates of money. But assuming, for the sake of argument but not otherwise, that during the course of the conspiracy and in carrying it to fruition, some of its devious ramifications may have taken the form of minor conspiracies among themselves to fraudulently obtain more money from some of their own number, than was intended to be invested in the scheme, this has no importance whatever in determining the guilt or innocence of the conspirators under the charge in the indictment. Such evidence may reflect upon and tend to establish the existence of the particular conspiracy charged, but that is the limit of its applicability, as the question here presented is whether the appellant was a party to the particular conspiracy charged.

*Jezewski v. United States, supra.*

It is conceded in this connection by appellant that the "evidence of these distinct transactions went in practically without opposition" and that "exceptions were not saved",

but it is contended that notwithstanding this the court has power and should consider the alleged error and "relieve the applicant therefrom".

This alleged error has not been urged before. It was not assigned as error until appellant's brief was filed, wherein it appears as assignment number X. This is not in accordance with rule 11 of this court, which provides that an assignment of errors shall be filed with a petition of appeal and that "error not assigned according to this rule will be disregarded, but the court at its option, may notice a plain error not assigned."

The court need not consider objections not contained in the assignment of errors but set out for the first time in the briefs.

*Wong Tai v. U. S.*, 273 U. S. 77.

In view of the evidence, it is hard to see wherein appellant was prejudiced, assuming without admitting that there was error. The strictness of the common law rules has yielded in modern practice to the doctrine that formal errors, not prejudicial to the rights of the accused, will be disregarded.

Section 269 of the Judicial Code (Tit. 28, Sec. 391, U. S. C. A., R. S. 726) provides:

"On the hearing of an appeal, *certiorari*, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the parties."

This court, in the case of *Green v. United States*, 19 Fed. (2) 850, said:

“But, while the ruling of the court below may have been technically error, we think it was error which did not effect the substantial rights of any defendant. Under Section 269 of the Judicial Code (Comp. St. 1919, Sec. 1246), a conviction is not reversible for errors on the trial where the defendant’s guilt is clear.”

In support of the quotation last above, this court cited eight decisions of Circuit Courts of Appeal and one of the Supreme Court of the United States, *Horning v. District of Columbia*, 254 U. S. 135, 65 L. Ed. 185. The Supreme Court said, in said referred to case:

“If the defendant suffered any wrong, it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt.”

In support of his position on this point, appellant cites and quotes from the case of *Lamento v. United States*, 4 Fed. (2) 901. In the cited case, the court was dealing with an indictment charging the plaintiff in error with violation of the narcotic laws, alleging that the accused, being a retail dealer, was in possession of about six ounces of opium without having paid the special tax and that he purchased such narcotics, the same not being in nor from the original stamped package. The court instructed the jury that if they concluded that this small quantity of opium was found in the defendant’s possession or control, that fact carried with it the conclusive presumption that the defendant was a retailer and required the jury to find him guilty. Such an instruction compelled the jury to find



the accused guilty as a retailer of narcotics from the mere possession of a small quantity thereof, even though he may have had it for his own use.

The case at bar, however, is very different, for the evidence is absolutely conclusive and convincing as to the guilty participation of this appellant in the conspiracy charged in the indictment.

In support of appellant's contention on this point, he also cites the case of *Terry v. United States*, 7 Fed. (2) 28, decided by this court in 1925.

In the last cited case, the indictment charges that the sixteen defendants therein, at Allen's Wharf in Monterey county, conspired together to commit offenses in violation of the Prohibition Act to the number of ten, and sets forth a large number of overt acts. Testimony was received over objection tending to prove that some six weeks prior to the incident at Allen's Wharf, the plaintiff in error employed one Frohn not a defendant to transport several barrels of liquor from Bodega Bay to a ranch house in the vicinity of Petaluma; that at about the same time, one of the defendants, Zucker, rented a barn from one Sousa in the vicinity of Petaluma and nine barrels of liquor were stored therein. This court, in its opinion, stated:

"There was no evidence of any kind, direct or circumstantial, tending to connect any of the other defendants with this prior incident or transaction"

that is, the incident at Allen's Wharf. This court, in passing upon the question, stated:

"Here we find no testimony tending to show any general conspiracy covering and including both the incident at Allen's Wharf and the incident at Bodega

Bay. On the other hand, every inference from the testimony is to the contrary. There is no testimony tending to show that the parties assembled at Allen's Wharf were parties to a conspiracy to transport, possess or sell intoxicating liquor at Bodega Bay six weeks before or that they had any knowledge whatever of that transaction. \* \* \* The indictment charges no conspiracy to transport, possess or sell intoxicating liquor at Bodega Bay in terms and avers no overt act to effect the object of such a conspiracy, if one existed."

In the instant case, all the transactions shown by the evidence related to one purpose only.

A substantive offense and a conspiracy to commit a substantive offense are separate and distinct offenses.

*Marcus v. U. S.*, 26 Fed. (2d) 454;

*Perry v. U. S.*, 18 Fed. (2d) 477.

An indictment for conspiracy need not allege all the elements necessary to charge the substantive offense which is the object of the conspiracy.

*Wong Tai v. U. S.*, 273 U. S. 77, *supra*;

*Hartson v. U. S.*, 14 Fed. (2d) 561.

And it need not describe the offense which is the purpose of the conspiracy with particularity.

*U. S. v. Eisenminger*, 16 Fed. (2d) 816;

*Ford v. U. S.*, 10 Fed. (2d) 339 (9th Cir.),  
(affirmed, 273 U. S. 593);

*Perry v. U. S.*, 39 Fed. (2d) 52.

As was said in the case of *Cochran v. United States*, 157 U. S. 286; 39 Law Ed. 704:

"The true test is not whether the indictment might possibly have been made more certain, but whether it

contains every element of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.”

“The object of criminal proceedings is to convict the guilty as well as to shield the innocent.”

*Evans v. U. S.*, 155 U. S. 504, 38 Law Ed. 830.

The next case cited is *United States v. Robinson*, 266 Fed. 243. This case holds that the overt acts charged cannot be resorted to to explain or aid in making out the criminal charge of conspiracy. The principle there announced is well supported by eminent authority, but we fail to see wherein it has any application to the facts in this case.

The case of *Brenner v. United States*, 287 Fed. 636 (2nd Circuit), is an indictment for conspiracy to use non-beverage alcohol for beverage purposes in violation of the Food Control Act, which charges as an overt act the purchase of five barrels of distilled spirits. The statute referred to contains nothing which made it unlawful to receive and transport alcohol or to have it in their possession or in their place of business. There is no charge that the accused conspired to sell such liquor for beverage purposes or for any other purpose. The Act referred to was known as the Lever Act which placed in the hands of the Government for war purposes absolute control over the distribution of food and fuel, but contained nothing prohibiting the use of non-beverage alcohol for beverage purposes. The indictment does not state

what contemplated use would constitute an offense, and because of such failure to state what the offense was, the indictment was held defective.

We will not undertake to review or analyze the many other cases cited by appellant in support of his contention that count one of the indictment is insufficient.

The charge of conspiracy need not be stated in the indictment with the same degree of particularity as is required in charging the substantive offense. The outlines of the confederation may be general in their character in the minds of the plotters. The precise means of effecting the scheme may not have been predetermined but left to the exigencies of the enterprise as it progressed.

*Lew Moy v. U. S.*, 237 Fed. 50 (8th Cir.);

*Dealy v. U. S.*, 152 U. S. 539, 38 L. Ed. 545.

Count one of the instant case alleges the conspiracy in the usual form, after which follows a more specific allegation:

“That is to say that they, the defendants, would thereupon unlawfully, and in violation of Sections 3 and 25, Title II of said Act, manufacture and possess apparatus intended and designed . . . for the manufacture of intoxicating liquor, all of which should then and there be fit for beverage purposes and all of which contained more than one-half of one per cent of alcohol by volume, none of said defendants then and there having or intending to have a permit” from any proper officer of the United States.

Under the laws of the United States no one is permitted to manufacture intoxicating liquor without a permit.

It is inconceivable on what theory it should be required that the indictment specify the particular articles contem-



plated for use in this business. As a matter of fact, in order to constitute a conspiracy of this character, it is not required to prove that any apparatus whatever was actually manufactured.

The success or failure of the object of the conspiracy is immaterial if, in the furtherance thereof, one of the overt acts charged was committed by any one of the conspirators.

*Lewis v. U. S.*, 11 Fed. (2d) 745 (6th Cir.);  
*Hyde v. U. S.*, 225 U. S. 347, 56 L. Ed. 1114.

### Count I of the Indictment.

On page 34 of his brief, appellant argues that where the language of the statute is general in terms and does not specifically set out the elements constituting the offense, an indictment charging the offense in the generic terms of the statute is not sufficient.

In this counsel for appellant, we believe, are assuming something that is not a fact. The indictment charges conspiracy under section 37 of the Criminal Code (Title 18, Sec. 88, U. S. C. A.), which provides that "if two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose \* \* \*" they are guilty. The indictment goes far beyond the generic terms of the statute and points out the particular laws that were violated and the manner and means to be followed in their violation.

In support of this contention, appellant cites several cases among which is *Pettibone v. United States*, 37 Law

Ed. 419; 148 U. S. 197. That indictment was against persons for corruptly and by threats and force intimidating and impeding a witness and officer in a court of the United States in the discharge of his duty but did not charge knowledge or notice or set out facts showing knowledge or notice on the part of the accused that the witness or officer was such. It is therefore evident that the Pettibone case has no application here.

The cited case was decided in 1893, long before the passage of R. S. 1025 (Title 18, Sec. 556, U. S. C. A.), which provides:

“No indictment \* \* \* shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.”

The *Cochran case*, *supra*, very recently has been cited with approval by the Supreme Court of the United States in the case of

*Hagner v. U. S.*, decided April 11, 1932.

The Hagner case also cites the following:

*Rosen v. U. S.*, 161 U. S. 29, 34;

*Grandi v. U. S.*, 262 Fed. 123;

*Stephens v. U. S.*, 261 Fed. 590;

*Bouldin v. U. S.*, 261 Fed. 672;

*Phipps v. U. S.*, 251 Fed. 879.

We quote the following from the Hagner case:

“Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.”

### **The Rule Requiring Certainty in the Indictment.**

On page 40 of his brief appellant cites the case of *United States v. Cruikshank*, 92 U. S. 542, 23 Law Edition, 588. The cited case was decided in 1875, long before the enactment of section 269 of the Judicial Code (Tit. 28, Sec. 391, U. S. C. A. passed February 26, 1919, 40 Stat. 1181). But notwithstanding that fact we believe that the indictment in the instant case complies with every requirement laid down by the Supreme Court in the Cruikshank case.

We respectfully submit that "every ingredient of which the offense is composed" is "accurately and clearly alleged" and that the description of the charge of conspiracy is sufficient to advise the accused of the charge against him and that the allegations are sufficient to enable him protection against further prosecution for the same cause and are sufficient to support a conviction.

### **It Was Not Error to Admit Statement of Olie Olson.**

On page 41 of his brief appellant states that his rights were invaded by the admission in evidence of the signed statement of the defendant Olie Olson which was made after the conspiracy terminated claiming that the evidence was hearsay.

This point has already been discussed under the heading of "Testimony of Whitfield" where we have shown that the court admitted this statement as against Olson only and specifically instructed the jury that it could not be considered for any other purpose.

The logical effect of appellant's objection to the admission of this statement carried to its ultimate end would bar

any confession or statement made by any one defendant where there are several accused in the same indictment from being received in evidence for any purposes whatever. Such ruling would require that each defendant be tried separately where there is any statement or confession involved.

In the course of appellant's discussion on this point he cites the case of *People v. Gonzales*, 136 Cal. 666. In that case two defendants were jointly charged with murder and the court admitted declarations made by one of the defendants inculcating the other and tending to excuse his own conduct. The Olson statement is altogether different as he does not attempt to excuse himself or to inculcate others except so far as the bare statement of the facts involved them.

The cited case, however, was decided in 1902 before the adoption of section 4½, Art. VI of the Cal. Constitution, which reads as follows:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

#### **Government's Exhibit 6, Consisting of Liquid Taken From the Gravity Tanks at the Foss Ranch.**

On page 42 appellant asserts that it was error to admit the above referred to exhibit and that the rights of appellant were prejudiced thereby. This subject has already



been discussed on previous pages of this brief under the heading of "Facts". The evidence shows that the still in question was set up and operated and the mash which Whitfield obtained from the gravity tanks shows the purpose for which the still was constructed.

The mash was analyzed and found to contain 3.24 per cent. alcohol by volume. The mere fact that this mash was not analyzed until some time after the termination of the conspiracy and that the alcoholic content might have resulted from fermentation subsequent to the abandonment of the still, the presence of such alcohol is *prima facie* evidence tending to show the purpose for which the apparatus, still, etc., were intended. The fact that some time elapsed between the time the mash was deposited in the gravity tanks and the time it was analyzed goes solely to the weight of the evidence.

On page 46 of his brief appellant contends that prejudicial error was committed by the court in refusing the defendant Coates the right to develop through the cross-examination of Malter the motives which impelled him to come forward and testify and the refusal of the court to permit appellant to develop bias, prejudice and interest on the part of Malter. As we have already stated on previous pages of this brief appellant was accorded every reasonable opportunity to show the interest or bias if any of Malter. The record shows that Malter was one of the originators of the conspiracy; that he was not indicted; that he assisted the government in obtaining the still involved and in offering his testimony in its behalf. Furthermore, we fail to understand wherein an answer to the question shown on page 45 would have helped appellant. The testi-

mony of Malter obviously had very little impression upon the jury and the transcript of his testimony will show that he afforded very little corroboration to the testimony of Stumpf. This is manifest for the reason that while Malter and Stumpf both testified that the defendant Brix was an active fellow-conspirator in the early stages of the enterprise, the jury failed to convict Brix. It is therefore impossible to conceive wherein and in what manner Coates was prejudiced by the ruling of the court complained of.

The comments of appellant on pages 45-46 of his brief concerning the exclusion of the testimony of the witness Malter on the ground that he had been permitted to read from the reporter's daily transcript has already been discussed.

From a full and careful review of the record and after careful consideration of the points urged by appellant we fail to discover any error on the part of the trial court which did or could have operated to the injury or prejudice of this appellant and we therefore respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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*Assistant U. S. Attorney.*



No. 6792

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff,*

VS.

ALEXANDER STUMPF, J. L. COATES,  
OLIE OLSON, THEODORE BRIX, ZONE  
KIRKORIAN, D. ARKALIAN, JAMES  
PROCTOR and EUGENE L. KENNEY,

*Defendants.*

J. L. COATES,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**REPLY BRIEF OF APPELLANT COATES**

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**FILED**

**MAY 19 1932**

**PAUL P. O'BRIEN,**  
CLERK





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No. 6792.

IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

ALEXANDER STUMPF, J. L. COATES,  
OLIE OLSON, THEODORE BRIX, ZONE  
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PROCTOR AND EUGENE L. KENNEY,

*Defendants.*

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*Appellant,*

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UNITED STATES OF AMERICA,

*Appellee.*

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**REPLY BRIEF OF APPELLANT COATES**

---

**Sufficiency of Count One of the Indictment**

In his opening brief appellant takes the position that Count One of the Indictment, namely, the conspiracy count, does not state facts sufficient to constitute a violation of the law. The Government, in its reply, in order to illustrate the sufficiency of this indictment, quotes



from *Cochran vs. United States*, 157 U. S. 286, 39 Law Ed. 704, as follows:

“The true test is not whether the indictment might possibly have been made more certain, but whether it contains every element of the offense intended to be charged and sufficiently apprizes the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.”

It is respectfully urged that the indictment under examination does not measure up to such test. In said Count One it is charged that the defendant and others conspired to violate sections 3 and 25 of Title Two of the Prohibition Act in that they did manufacture and possess apparatus intended and designed by said defendants for the manufacture of intoxicating liquors.

The character of the *apparatus* with which they are charged to have conspired to manufacture and possess is not described, nor is the apparatus in any manner described. Therefore, that such apparatus was intended and designed for the manufacture of intoxicating liquor, becomes a mere statement of a conclusion by the pleader.

Furthermore, there is nothing in Count One to apprise the defendant of what apparatus he conspired to possess, and after the filing of that indictment the Government might have taken any position in respect to the component elements of that apparatus that it saw fit, and there is nothing now which would prevent the Government from laying another conspiracy to the same defendants and in identical language, with the expecta-

tion of using in evidence other physical things than those used in the case at bar, as designed and intended for the manufacture of liquor. The defendant could not plead former jeopardy or conviction.

It is no answer to this proposition to state that this is a case of conspiracy and hence the indictment need not be pleaded with the same degree of particularity as is required in charging a substantive offense. Machinery, property, implements, tools, material of almost any character might or might not constitute apparatus intended and designed, from the pleader's viewpoint, for the manufacture of intoxicating liquor; but the absence of any description of such apparatus, we respectfully repeat, leaves the defendant, first, wholly ignorant in point of fact of the things which he conspired to possess, and, second, leaves him open to any number of charges without the ability to plead the jeopardy of a former conviction. We believe that the necessity of pleading facts, and not conclusions taken substantially from statutory declarations, in order to state a criminal offense in an indictment, is illustrated in the case of *Aroniss vs. United States*, 13 Fed. 2nd, 620. The indictment there charged that the defendants "did knowingly, wilfully and unlawfully maintain a common nuisance, that is to say, at the premises known as the Bismark Cafe, situated at 25 East Hanover street, in the city of Trenton, where intoxicating liquors, namely, beer, wine and whiskey, were kept, in violation of title two of the National Prohibition Act," etc. The Court says that the statement that the defendants did unlawfully maintain a common nuisance at a named place and in violation of the National Prohibition Act did not state an offense

as maintaining a nuisance, as it did not give any indication of the circumstances that made it such, and says that the added words, "where intoxicating liquors, namely, beer, wine and whiskey, were kept," does not make the indictment sufficient.

The Government took the position that the indictment was good because it repeats the words of the statute, which provides that

"any \* \* \* house \* \* \* where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, \* \* \* is hereby declared to be a common nuisance."

But the Court held:

"To charge that a place was a common nuisance, the pleadings must show the acts, there occurring, by which the place was used to violate the law. The mere allegation that it was a place where liquors were kept leaves the character of the place open to dispute and, therefore, to uncertainty, for, under the law, liquors may be kept lawfully and kept unlawfully. \* \* \* One ingredient is the use to which the place charged to be a common nuisance was put; in this instance, we surmise, the keeping of the liquor for sale; but if liquor was not kept for that purpose, the place was not a common nuisance. Merely stating an offense in the words of the statute is not sufficient except where in cases 'where the words of the statute themselves \* \* \* fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' (*United States vs. Simmons*, 96 U. S. 360,

362, 25 L. Ed. 819; *Evans vs. United States*, 153 U. S. 584, 587, 38 L. Ed. 830.)

"The statute declared on does not do this. It merely refers to a house where liquor is kept 'in violation of' one of its provisions and leaves the pleader to show the violation by stating facts which come within its terms."

The Court then points out that it is not aided by reference to the alleged common nuisance as a cafe, because the Government urged that keeping liquors in cafes is not lawful, and finally says:

"A valid accusation of crime cannot be made by argument or by inference, but can only be made by stating facts which, without more, show the offense."

It is elementary that a defendant is presumed to be innocent and that that is the reason why an indictment must allege facts which directly brings home to him the crime with which he is charged. He is not, by law, supposed to know or held to have knowledge.

The things which the pleader may have had in mind as apparatus intended and designed by the defendant for the manufacture of liquor, yet in no sense designed to that end, are too numerous to mention. As to what they are, the indictment is silent in respect of such identification of the physical things which the defendants intended to possess as would enable the defendant to combat a future indictment by the allegations of fact in the first indictment.

As against this argument of appellant the Govern-



ment cites R. S. 1025 (title 18, sec. 556, U. S. C. A.), which provides:

“No indictment \* \* \* shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.”

This appellant is not complaining that the indictment in Count One is insufficient in matter of form, but in matter of substance, in matter of failure to charge the very thing that he is said or supposed to have done or contemplated; the failure to so much as hint the nature of the thing he conspired to possess or to show its adaptability to the purpose of violating the law; and since, as the Government points out, the *Cochran* case, *supra*, has very recently been approved by the United States Supreme Court in the case of *Hagner vs. United States*, decided April 11, 1932, the statute relied upon, 1025, above quoted, is of no aid to the Government, because the rule in the *Cochran* case and the rule in the *Aroniss* case were laid down long after the enactment of that statute.

### **Error to Admit Statement of Olie Olson**

In his opening brief appellant, at page 41, urged error in the admission in evidence of a signed statement of defendant Olie Olson, made after the termination of the conspiracy, as hearsay. The Government, in reply, would seem to take the position that the authority relied upon, namely, *People vs. Gonzales*, 136 Cal. 666, is no

longer the law because decided before the adoption of section 4½ of article 6 of the California Constitution, quoted in its brief, and providing generally that judgment shall not be set aside or a new trial be granted for errors in the admission of evidence unless the court is satisfied that there has been a miscarriage of justice.

Without speculating as to whether the rule of the *Gonzales* case would or would not be followed by the Supreme Court of California because of the enactment subsequent to its decision of the constitutional provision referred to, we believe that the same does not warrant the receipt in evidence of hearsay testimony; does not do away with the right of a defendant to be confronted by a witness in order that he might cross-examine him. No such right was accorded appellant so far as the testimony of Olie Olson, given in the form of a statement made after the culmination of the conspiracy, was concerned.

### **The Facts Are Insufficient to Warrant the Conviction of Coates**

Among the assignments of error in appellant's opening brief is found, "The evidence is insufficient to support the verdict." Much of the testimony received at the trial is included in the brief, and upon that testimony appellant took the position in argument that the evidence which was received indicated the existence of at least two distinct conspiracies to which Coates was not common, namely, the Stumpf-Malter-Coates conspiracy, if any existed, and the Brix-Malter-Stumpf conspiracy, if such existed.

The Government, in its reply brief, contends that not only there were not two distinct conspiracies, but says that appellant's argument leads to an absurd conclusion, namely, that every time a new participant enters into a conspiracy such entrance terminates the conspiracy then under way and creates a new one, and that such doctrine finds no support in law.

Taking the Government's brief as a whole, it seems to view this situation from the perspective which may be thus stated: That any conviction which may be upheld should be upheld. We, however, while granting the propriety of always upholding just convictions, believe that only those convictions should be affirmed which meritoriously ought to be affirmed, and in consequence respectfully draw this court's attention to what we conceive to be a very reasonable version of the evidence received below, which indicates to us that Stumpf and Malter never intended, as the result of conspiracy or otherwise, to construct a still or to seriously possess property or apparatus designed and intended to construct a still; but, rather, that they at most assumed to possess such property with a view to obtaining money from victims. Viewed from this standpoint, the testimony of Government witnesses, and we refer particularly to that of Stumpf and Malter, shows that their design and plan was to obtain money from Brix and Coates by the operation of what appears to be a confidence game.

Malter had been a dealer for many years in grape concentrate syrups, and says on page 168 of the transcript that he "sold the same to those who would illegally extract alcohol therefrom." He was, in a sense, a con-

spirator, and the chief conspirator; he was not indicted; he called himself the brains of the enterprise, and such brains was his contribution to the conspiracy.

Stumpf, who admittedly had been convicted of two felonies against the Government, was to contribute to the Stumpf-Malter enterprise his consummate skill as a boot-legger.

In order that this combination might profit them, they looked for dupes. Brix, dupe No. 1, was a gas station filling operator and he was inveigled into the Malter-Stumpf-Brix conspiracy, which had no other object than to secure money from Brix and not to construct a still or to possess any property really intended for that purpose. He put up his hard-earned money, some seventeen hundred dollars, and when he had "run out of the deal," quoting Stumpf's testimony (Tr., p. 93), Malter and Stumpf would appear to have decided that the time was ripe for another dupe to be called upon for money.

It is not claimed that the first conspiracy agreement or effort ever resulted in anything more than the taking of Brix's money, the pretending to build a still and the delaying of proceedings until Brix became wearied, and the consequent putting of Brix upon one side that somebody else might be looked for. This scheme, pure and simple, was to draw somebody into the transaction by pretending to manufacture grape concentrates or syrups, which was legal, rigging up of an improvised still, without ever intending to run it as such, and, when the unfortunate victim would want an accounting, to dismantle this stage machinery or apparatus, with the



familiar cry that the "prohibition agents are coming." That is what happened in the Brix case.

Stumpf testified several times, as appears from appellant's opening brief, as did Malter, that the Malter-Stumpf-Brix combination was conceived and terminated before the appellant Coates became the financial angel and the victim of the second or renewed effort of Stumpf and Malter to find someone from whom they might get some more money. Stumpf testified (Tr., p. 65) that he and Malter saw Coates on the street in Fresno and it looked like some new money for them. Malter suggested that they talk to Coates to get him into a deal. As to what the deal was going to be, the testimony was fragmentary, but Malter and Stumpf worked a confidence game of having Coates and Malter turn over to Stumpf, who was styled the treasurer, five hundred dollars each, and thereafter, without the knowledge of Coates, Stumpf returned the five hundred dollars to Malter. Stumpf testified Mr. Malter was to put up half the money and Mr. Coates half the money. "I knew all the time that Mr. Malter never put up any money. We were fooling Coates. Coates believed Malter was putting up 50-50 all the time." (Tr., p. 89.)

Having gotten Coates into this game, the evidence shows that the base of operations was shifted every two or three weeks on the theory that the "prohibition agents are coming."

Meanwhile the so-called still was not in operation, nor could it operate.

There came a time when Coates had put into this enterprise approximately three thousand dollars; and,

taking with him one Olson, he went out to the Foss ranch, the place described in the indictment, and Olson immediately told him that this so-called still could not run or would not run; that the sugar and water which was being masqueraded as mash was ineffectual for any purpose, and Coates, having discovered that a fraud had been perpetrated on him, became indignant and in no uncertain language declared that he had been defrauded, victimized, would not put up another cent, and threatened legal action.

At this juncture the organized forces of money-getting, Stumpf and Malter, and the Government, came in contact and moved very quickly. The so-called plant at the Foss ranch was hijacked by Stumpf (testimony of Malter, Tr., p. 170) and moved down to Malter's ranch, where, by appointment, the prohibition agent, Mr. Whitfield, was there to seize the apparatus "designed and intended" for the manufacture of intoxicating liquor containing an alcoholic content of more than one-half of one per cent by volume.

In the foregoing narrative we have failed to call the court's attention to three things:

The Government, in its anxiety to convict, offered testimony that Malter and Stumpf brought to Coates at Fresno a little mayonnaise jar or glass containing a small quantity of potent beverage, and that Coates took several drinks and said, "It's good," and asked whether he could not get five gallons of this for drinking purposes. (Tr., p. 165.) Secondly, that some time in January a sample was taken of the so-called mash or mess at the Foss ranch, which was analyzed in April and

claimed to be mash containing 3.24 per cent alcohol by volume. Since, from the testimony of the Government witnesses, it appears that such so-called mash as was on the Foss ranch was nothing but sweet water, from which no alcohol could be made, we doubt that it could be seriously contended that the contents of the mayonnaise jar given to Coates had ever gone through the still on the Foss ranch; and from the facts in the case it is safe to assume that it had not, but that it constituted just one of the means adopted by Stumpf and Malter for exciting the interest of Coates in order that he might put up some money. The third thing we failed to mention was that Malter and Stumpf, not being satisfied with having duped Brix and Coates, looked for other victims, and, in consequence, sought out somebody else, with the result that twenty-five hundred dollars was put up to buy out some supposed partner's interest in the machinery, with Malter and Coates, and the man who put it up did not know that Coates was supposed to be a co-adventurer with them, nor did Coates know that Arkalian had been taken in. (See testimony, p. 73.)

It seems plain to us that these two Government witnesses, Malter and Stumpf, merely were seeking money from a series of victims, never having any purpose or design to operate a still; but, assuming the truth of their evidence, to at best use what appeared to be a still, to play upon the cupidity of victims. The brains of the enterprise, who feared that his indignant victims would seek recourse against him for the recovery of the moneys which he had filched from them respectively, was not indicted, but he turned his victims over to the Government to save himself, and each evening received a

daily transcript of proceedings that he might familiarize himself therewith in order that his victims should be convicted of a crime which was never contemplated by him, Malter, or Stumpf.

It does not seem to us that justice has been done, but merely that Malter has victimized certain people with the aid of Stumpf; each of them has gone free, and Coates, among others, has been convicted of a crime that Malter and Stumpf never intended should culminate in anything more than a means of obtaining money.

When Malter discovered that he could get no more money, either by various statements to his victims as to the buying of stills in Los Angeles or as to the necessity of buying materials to erect stills on one or another of the ranches where the evidence shows work was done by him, he realized that the safest thing for him to do was to assume the position with Stumpf that there had been a genuine conspiracy to possess apparatus adapted to making alcohol and "turned in" his victims to the Government.

The evidence in this case shows that the parts of the alleged still had been dragged all over Fresno County and had been shown to various victims, none of whom knew that another was interested, merely to excite their cupidity and get their money; not to buy a still or stills with, but merely to profit Malter and Stumpf.

We most earnestly suggest that this version of the testimony is reasonable and consistent with the very apparent purpose which inspired Malter and Stumpf, and that when the evidence is viewed in its proper perspective it



fails of establishing a reasonable and just basis for a verdict against the appellant.

It is therefore respectfully submitted that for the reasons herein and in the opening brief of the appellant Coates urged, the judgment should be reversed.

Dated: May 16, 1932.

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GEORGE C. CARMODY,  
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No. 6792

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

13

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

ALEXANDER STUMPF, J. L. COATES, OLIE  
OLSON, THEODORE BRIX, ZONE KIRK-  
ORIAN, D. ARKALIAN, JAMES PROCTOR  
and EUGENE L. KENNEY,

*Defendants.*

J. L. COATES,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

MOTION FOR REHEARING

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FILED

JUN 27 1932

PAUL F. O'BRIEN,

CLERK



No. 6792

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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UNITED STATES OF AMERICA,

*Plaintiff,*

VS.

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OLSON, THEODORE BRIX, ZONE KIRK-  
ORIAN, D. ARKALIAN, JAMES PROCTOR  
and EUGENE L. KENNEY,

*Defendants.*

J. L. COATES,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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## MOTION FOR REHEARING

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The defendant, J. L. Coates, in the above action does hereby move this Honorable Court for an order



directing and granting reargument on the several counts as in the indictment in this case set forth, and on each of them, and on the matters and proceedings as contained in the record in this case materially affecting the constitutional rights of this defendant, to-wit:

This motion raises three main points:

(a) The purpose and effort of defendant was the promotion of his vineyard industry and not with any purpose or act of illicit distillery.

(b) The apparent assumption on all sides was confession of guilt by defendant.

(c) The sentence is not justified by the facts and circumstances.

---

## I.

The severity of the sentence, to-wit, one year and one day in Federal penitentiary McNeil's Island, imposed on the defendant in this case, or indeed any sentence of imprisonment was, it is believed, wholly unjustified by all the facts and circumstances developed during the trial in the District Court, and is abuse of judicial discretion.

## II.

It will be noted that the indictment in this case was found and presented long after the plant had been dismantled and after these defendants had severed all

connection with Stumpf, or with the plant. Stumpf's conspiracy was therefore ended.

The record in this case is believed to be consistent with the innocence of these defendants, although the opinion rendered by this Honorable Court proceeds upon the view that it was admitted on behalf of the appellant that he was a party to the conspiracy. In that connection, we call to the Court's attention that the mention of two conspiracies and naming of parties thereto, was not in any sense an admission of guilt, but was a statement by counsel of their analysis of the organization of conspiracy, and the employment of the terms used by counsel was the sole and only basis for any construction of admission by defendant of connection with Stumpf as conspirators. This Court will see, therefore, the great injustice and injury done to this defendant by such a construction being carried throughout the entire case. Nowhere in the case does it appear that defendants admitted any guilt whatever. On the contrary they proceeded to trial on the theory that they were not guilty, for had such admission been made in the case, the trial would have been an absurdity, and these defendants should not be charged or held responsible for a misconception, either through their counsel or otherwise, and we pray this Court for relief through rehearing and a new trial.

### III.

The Act of Congress requires the possessor of a still to secure a permit for its use. Witness Stumpf tes-

tifies that the still, so-called in this case, was a patched up job affair (see Whitfield, page 148); Witness Olson, also testifies that the still, as arranged there, would not work in that way (page 108).

Obeying the Act of Congress, there was a choice between securing permit, and dismantling the plant and destroying the still. The latter course was chosen and the plant entirely dismantled. *Non constat* that had this defendant, or Stumpf, or anyone chosen to operate the still, that he would not have secured the permit as required by the Act of Congress, for which he had abundant time and opportunity so to do, and this Court, we submit, will now construe that situation favorably to this defendant. It is said that a small quantity of alcohol was secured from the still in a mayonaise bottle, but as to that, can we believe Stumpf who admittedly was playing a most deceitful game of fraud against Coates, or may he not have procured the alcohol elsewhere?

The dismantling of the plant was brought about by Coates demanding from Stumpf an accounting and return of the money he, Coates, had loaned to Stumpf, as we contend, and upon opportunity expect to prove.

#### IV.

The record justifies the conclusion that Stumpf had no intention whatever of engaging in illicit distilling of alcohol and that no one in this case ever engaged in the manufacture or distilling of liquor, and as the right and time then both existed for obtaining a

license or permit, it would seem to us that the action of the Government in securing the indictment was unnecessary in light of the fact that the plant had never operated and had been dismantled.

## V.

That Stumpf never meant to engage in such trade, and did not so engage, but did abandon his scheme and the still at the point when he discovered he could borrow no more money from Coates, who should not now be charged with all the Stumpf rascality.

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## THE FUNDAMENTAL

It is fundamental in law, as well as business sense, that, in any enterprise, minds must meet. An analysis of this instant case shows Alexander Stumpf standing alone on the one side, promoting a fraudulent scheme of deceit and false pretense, and on the other side six victims including the two defendants, Coates and Arkalian, and Brix; Coates' connection with Stumpf was in aid of his grape concentrate business; Arkalian was a neutral figure but in contact with certain circumstances, while Brix was admittedly in conspiracy with Stumpf and Malter, yet notwithstanding that he was a victim of Stumpf, so that in case of either or all of them, the minds did not meet on the common ground with Stumpf, and therefore no conspiracy involving the infraction of the United States statute under which they were indicted, and no guilt could be charged to them.



Stumpf alone had any knowledge of stills or their operation, and as appears from the testimony, Stumpf had no purpose to operate a still, and in the absence of such purpose these defendants could not be guilty.

## VI.

As showing Coates' condition of mind and business purpose with reference to the Stumpf proposition, the testimony of Coates Junior (page 175) shows that the purpose of this defendant in talking with Stumpf at all, was to promote the concentrate industry in which he, the defendant, was largely interested.

The witness Cain, familiar with grape concentrate business, also explains about Coates and his grape concentrate business, and that he never heard Coates say anything about manufacturing alcohol, and that a still is necessary in manufacture of grape concentrate.

The witness Ferdinand Andreas also refers to the intention of Coates to put up a concentrate syrup plant.

Likewise, the prejudiced witness Malter testifies that the grape concentrate deal was mentioned to him by Coates (page 167).

Also, the testimony of Nichols (page 174) referring to conversation with different of the parties says, "All the conversation was about concentrates."

The witness Coates testifies (pages 176-177) that he got from Whitfield, a Government witness, that he, Whitfield, believed that Coates started in a grape concentrate syrup deal in the beginning.

Edna Pearl Coates testifies that the defendant, Coates, told his father and the witness that he had gone into the grape concentrate syrup.

Also, W. G. Phillips, a witness, testifies he heard a conversation between Coates and Malter with reference to a grape syrup business—"a proposition for entering into the manufacture of grape syrup was the topic of discussion between the gentlemen besides myself. Malter explained how grape syrup was manufactured."

To the same effect was the testimony of Francis Morin (page 184): "In conversation with Malter he told me that he and Coates were in the syrup business."

In the consideration of the case, the testimony of all those witnesses established for Coates the purpose of his going into the business at all was the grape concentrate or syrup business and not in illicit manufacture of alcohol. In addition to all the above is the testimony of Stumpf himself (page 66) at the time he mentioned the proposition to Coates that "Coates said: 'well, if it's the right thing, why I will be glad to come in,' " and no other construction should be given against the interest of this defendant than that he meant the grape industry.

Further, Coates Junior testifies (page 176) that Malter absolutely assured him that through the hard efforts of Henry Barbour, Congressman, he had, or

would acquire, a proper and legal permit to make grape concentrates.

In the face of all that testimony as to the purpose of Coates advancing money to Stumpf, is it not clear that Coates did not have a fair, impartial trial?

Perhaps it would be considered idle to speculate as to why these matters did not come distinctly to the attention of the jury, but it seems the plain fact that the case should be tried on its merits on the theory of absolute innocence under the counts of the indictment. As matters went, these two boys seemed to be, in some degree at least, the innocent victims.

## VII.

We are mindful of the position of the case as affected by the finding of the jury, but we submit to this Court that, as the case seems not to have proceeded upon any theory of innocence, the jury never had opportunity for consideration of the points herein referred to, especially the items from "a to h," and while we do not disagree with the legal propositions laid down in the opinion by His Honor, Judge Neterer, District Judge, yet, the injustice which circumstances have surrounded this defendant is so appealing that it is believed, and we trust, that this Court will see that side of the case to be uppermost, so that a future trial will be upon all of the facts instead of limited mainly to Alexander Stumpf.

## VIII.

The record, taken as a whole, justifies the construction and conclusion that ('oates' connection with Stumpf was as a creditor consistently following from place to place the money he had unwittingly handed to Stumpf, and that the relation between them was that of debtor and creditor, and in that character alone he sought Stumpf out at different times and places, having the purpose and belief that the proposed business was the manufacture of grape concentrates.

## IX.

The record, as a whole, justifies the view and conclusion that defendant did not have a fair and impartial trial, and we submit to the Court that when defendant had closed his case before the jury and requested of the Court peremptory instructions that they should find for the defendants, that such request or motion was in the nature of a demurrer to the case as presented, and, in the absence of testimony by the defendant, we beg that this Court will give due consideration to that feature and grant a rehearing and new trial to the end that all facts may be presented before the jury and justice done to these defendants.

That request to the court below for instructions to find for the defendants is the key, not only to defendant's confidence in the request in the nature of



demurrer, but his great confidence in his innocence appearing in the case from the evidence, and it is with confidence that we take the same attitude.

## X.

During the trial and in the instructions to the jury, and also in the opinion filed by this Honorable Court, much was made over the memorandum on a yellow card containing items written by this appellant, giving costs of items of material purchased by Stumpf.

Regarding that, we respectfully submit to this Court that the proper and fair construction of the incident of that card was to establish by Coates the amount of money that was owed to him by Stumpf, and that card was used as an item of guilt as a conspirator, and we submit that when that piece of paper was given what seems a forced construction against the appellant, and given such prominence and importance in the case before the jury and in this Court, it was most damaging and prejudicial to the interests of appellant, and it seems to us should now in this Court entitle appellant to a new trial.

## XI.

We respectfully submit to this Court the following rulings of the court below against appellant and over his objection and exception, all of which we contend are prejudicial to the interests and rights of defendant:

- a The trial court admitted in evidence certain parts of alleged still which had been found hidden among some bushes, and went before the jury as equipment owned by all the alleged conspirators, when in point of fact they were, and had always been, the property of Alexander Stumpf, and the plant dismantled and any conspiracy ended. This matter was extremely prejudicial to the interests of appellant in that it suggested to the jury the idea of a still in operation controlled and owned by this defendant as a conspirator.
- b The trial court admitted Alexander Stumpf to testify, under objection, regarding a conversation between himself and Malter regarding matters that occurred after the still had been dismantled and the conspiracy ended by Coates' interference. That assumption and statement of conspiracy in connection with the immediate offer of "Condenser" was of itself prejudicial to this defendant.
- c The admission by the court of the yellow card, as exhibit #4, was extremely prejudicial to the interests of appellant.
- d The court admitted evidence, exhibit #5, being a contract of purchase for the Foss ranch bearing the signatures of Foss and wife and Alexander Stumpf. This offer, admitted after Stumpf had shown himself a conspirator, and the man dealing with the ranch, was irrelevant and immaterial as tending only to indicate that Coates was con-

nected, as a party, in the purchase and ownership of that property, and he was therefore greatly prejudiced thereby.

e That the court permitted Stumpf to testify, against objection, conversations or statements of D. Arkalian, one of the defendants, regarding alleged transactions by him connected with narcotics, and that evidence was extremely prejudicial to this defendant. Objection overruled and exception taken.

f The court permitted a typewritten statement of certain conversations attacking Mr. Coates on some collateral ground, and defendant had no opportunity for cross-examination, which was necessarily prejudicial to appellant (Whitfield, page 141).

g W. G. Whitfield was permitted by the court, against objection, to testify about an alleged offer of Brix to plead guilty as a conspirator; not being made in the presence of defendant Coates, and made after conspiracy had fully terminated. We complain of being thereby prejudiced.

h The following ruling was made:

“THE COURT. Is this the result of a conversation that was told you?

A. Yes sir.

Q. By whom?

A. By Stumpf.

THE COURT. All right, overruled,”  
to which exception was taken.

## XII.

In the interest of this defendant, it is an important and rather remarkable feature to call to the Court's attention that the many offers and objections to testimony on the part of the Government there was favorable action of the Court, and all offers of testimony made by the defendant objected to by Government were sustained.

## XIII.

While it is true, as pointed out by this Court, that defendant must be prepared to meet the facts set forth in the indictment and that the question of sufficiency of the indictment was not properly raised in the case, we submit and now beg that this Court will take that circumstance into consideration in determining the question of a new trial, when defendants themselves can be heard and all facts placed before the jury.

## XIV.

The defense, having rested its case, and the matter of time for reargument having been settled, the Court made the following remarks, in the presence of the jury:

“Gentlemen, I feel this way, that the facts of this case, or rather the questions that the case will determine or will turn upon, is quite clear, and if in fact I question whether the limit given is not an excessive limit in view of the entire complexion of the case; I don't think any injustice is being done to anybody by reason of the limit placed upon the time.”



On application for time, the Court allowed forty minutes and then added:

“No, the case must go to the jury today.”, to which counsel for this defendant took an exception.

It may be observed in this connection that the trial court itself being apparently misled by that very unfortunate occurrence of two conspiracies in the record being construed and treated as admission of guilt on the part of this defendant, and presumably that conviction on part of the court below accounts for the sentence as it stands. May we say here that the jury was out approximately 24 hours.

## XV.

Thereupon, the defendant Coates, through his counsel, then and there asked the court to instruct the jury to return a verdict of not guilty on the ground that the evidence was, and is, not sufficient to justify any other verdict than a verdict of not guilty on the first count, the second count, the third count and the fourth count of the indictment, which request was by the court denied and exception taken by defendant.

Very respectfully submitted,

D. B. MAXWELL,

DAVID E. PECHINPAH,

*Attorneys for Appellant.* *ye*









